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164

TRANSCRIPT OF RECORD

469281
L.C.

Supreme Court of the United States

OCTOBER TERM, 1941

No. 112

C. L. WILLIAMS, INDIVIDUALLY AND AS DULY
APPOINTED AND AUTHORIZED AGENT AND
REPRESENTATIVE OF HERBERT AIKEN, ET
AL., PETITIONERS,

VS.

JACKSONVILLE TERMINAL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 31, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

INDEX

PAGE

Bill of Complaint	1
Summons issued 8/19/40 and Marshal's Return there- on	5
Answer	7
Amended Bill of Particulars	13
Motion of defendant for Summary Judgment	44
Notice of hearing on Motion for Summary Judgment	45
Supporting Affidavit of John L. Wilkes	45
Stipulation of Counsel in re: that the defendant under the "Fair Labor Standards Act of 1938," etc., filed Oct. 7, 1940	47
Motion of Plaintiffs for Summary Judgment and Notice	48
Stipulation of Counsel in re: Amendment of Bill of Particulars, dated 10/10/40	49
 TRANSCRIPT OF EVIDENCE ON MOTIONS FOR SUMMARY JUDGMENT	 51
Stipulation in re: submission of Letters and Tele- grams, etc.	51
Evidence for Plaintiffs:	
Deposition of John L. Wilkes	59
John L. Wilkes (Recalled) ...	70
L. L. Wooten	71
Frank Leggett	84
Stipulation of Counsel waiving signatures of the witnesses to their depositions	92
Notice to Take Depositions Upon Oral Examination	92

II INDEX—Continued

PAGE

Exhibits:

Exhibit Pltfs. #1-A—Letter, L. L. Wooten, General Chairman of the Brotherhood of Railway and Steamship Clerks, etc., to C. G. Sibley, et al., dated 10/25/38	93
Exhibit Pltfs. #1—Letter, L. L. Wooten, Genl. Chairman of the Brotherhood of Railway and Steamship Clerks, etc., to J. L. Wilkes, dated 11/14/38	95
Exhibit Pltfs. #2—Letter, L. L. Wooten, General Chairman, to J. L. Wilkes, dated 11/16/38	96
Exhibit Pltfs. #3—Letter, L. L. Wooten, General Chairman, to J. L. Wilkes, dated 11/26/38	97
Exhibit Pltfs. #4—Letter, L. L. Wooten, General Chairman, to J. L. Wilkes, dated 11/30/38 with Proposed Agreement attached	98
Exhibit Pltfs. #5—Letter, L. L. Wooten, General Chairman, to J. L. Wilkes, dated 12/7/38	100
Exhibit Pltfs. #6—Letter, General Chairman to J. L. Wilkes, dated 1/13/39	101
Exhibit Pltfs. #7—Letter, L. L. Wooten, General Chairman, to J. L. Wilkes, dated 2/8/39 ..	102
Exhibit Pltfs. #8—Letter, L. L. Wooten, General Chairman, to J. L. Wilkes, dated 2/20/39 ..	103
Exhibit Pltfs. #9—Letter, L. L. Wooten, General Chairman, to J. L. Wilkes, dated 3/5/39 ..	104
Exhibit Pltfs. #10—Telegram, L. L. Wooten to J. L. Wilkes, dated 3/20/39	105
Exhibit Pltfs. #11—Letter, L. L. Wooten, General Chairman to J. L. Wilkes, dated 6/2/39 ..	106
Exhibit Pltfs. #11—Letter, L. L. Wooten, General Chairman, to J. L. Wilkes, dated 5/26/39 ..	106

INDEX—Continued

	PAGE
Exhibits—(Continued):	
Exhibit Pltfs. #12—Agreement between Jacksonville Terminal Co. and The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, effective June 16, 1939	107
Exhibit Pltfs. #13—Letter, L. L. Wooten, General Chairman, to J. L. Wilkes, dated 7/8/40 ..	116
Exhibit Pltfs. #14—Letter, L. L. Wooten, General Chairman, to J. L. Wilkes, dated 7/25/40 ..	117
Exhibit Pltfs. #15—Letter, L. L. Wooten, General Chairman, to J. L. Wilkes, dated 8/2/40 ..	118
Exhibit Pltfs. #16—Letter, L. L. Wooten, General Chairman, to J. L. Wilkes, dated 8/7/40 ..	119
Exhibit Pltfs. #17—Letter, L. L. Wooten, General Chairman, to J. L. Wilkes, dated 8/17/40 ..	120
Exhibit Pltfs. #18—Notice of Jacksonville Terminal Company to Red Cap, dated 10/24/38 ..	121
Exhibit Pltfs. #19—Letter, Jacksonville Terminal Co. to L. L. Wooten, Genl. Chairman, dated 10/27/38	122
Exhibit Pltfs. #20—Letter, Jacksonville Terminal Co. to L. L. Wooten, General Chairman, dated 11/15/38	124
Exhibit Pltfs. #21—Letter, Jacksonville Terminal Co. to L. L. Wooten, General Chairman, dated 11/16/38	125
Exhibit Pltfs. #22—Telegram J. L. Wilkes to L. L. Wooten, General Chairman, dated 2/10/39	126
Exhibit Pltfs. #23—Letter, Jacksonville Terminal Co. to L. L. Wooten, General Chairman, dated 2/21/39	127
Exhibit Pltfs. #24—Letter, J. L. Wilkes to L. L. Wooten, General Chairman, dated 3/20/39 ..	128

IV

INDEX—Continued

PAGE

Exhibits—(Continued):

Exhibit Pltfs. #25—Telegram, J. L. Wilkes to
L. L. Wooten, General Chairman, dated
6/3/39 129

Exhibit Pltfs. #26—Telegram, J. L. Wilkes to
L. L. Wooten, General Chairman, dated
6/3/39 129

Exhibit Pltfs. #27—Letter, J. L. Wilkes to L. L.
Wooten, General Chairman, dated 7/2/40 130

Exhibit Pltfs. #28—Letter, J. L. Wilkes to L. L.
Wooten, General Chairman, dated 7/24/40 131

Exhibit Pltfs. #29—Letter, Jacksonville Terminal
Co. to L. L. Wooten, General Chairman,
dated 8/7/40 133

Exhibit Pltfs. #30—Wage Agreement dated 8/-
9/40 134

Exhibit Pltfs. #31—Letter, Jacksonville Terminal
Company to L. L. Wooten, General Chair-
man, dated 8/14/40 136

Exhibit Pltfs. #32—Blank Agreement between
Jacksonville Terminal Co. and The Brother-
hood of Railway and Steamship Clerks,
Freight Handlers, Express and Station
Employees 138

Exhibit Pltfs. #33—Certificate of Gustav Peck,
Presiding Officer, dated 10/2/40 147

Findings and Recommendations of the Pre-
siding Officer, Gustav Peck, dated
9/28/39 before The United States
Dept. of Labor Wage and Hour Divi-
sion, Washington, D. C. 148

v INDEX—Continued

PAGE

Exhibits—(Continued):

Exhibit Pltfs. "A"—Receipt of Walter Burch for \$10.05 from Jacksonville Terminal Co., for Back Wages Due Under The Fair Labor Standards Act, dated 8/17/39 165

Exhibit Defendant "A"—Revised Agreement between The Jacksonville Terminal Company and Employes herein named represented by The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, effective February 1, 1937 166

TRANSCRIPT OF PROCEEDINGS BEFORE HON.

CURTIS L. WALLER, U. S. DISTRICT JUDGE, OCT. 17, 1940 189

Case called, etc. 189

Notice by Hon. Louie W. Strum, U. S. District Judge to Attorneys, dated 9/17/40 190

Objections of defendant to the introduction of certain Exhibits offered by Plaintiffs and Ruling thereon 191

Stipulation re: Attorneys Fee for Plaintiffs 194

Stipulation of Counsel relative to Transcript of Proceedings on 10/17/40 194

Judgment, entered 10/21/40 195

Motion for New Trial with Proof of Service thereon 204

Order overruling Motion for New Trial 206

Notice of Appeal 207

Appeal Bond 208

Appellants' Direction for Preparation of Record 209

Stipulation of Counsel for Preparation of Record ... 211

Clerk's Certificate 212

INDEX—Continued

	Page
Proceedings in U. S. C. C. A., Fifth Circuit	213
Minute entry of argument and submission	213
Opinion, Sibley, J.	214
Dissenting opinion, Holmes, J.	221
Judgment	223
Application for stay of mandate	224
Order staying issuance of mandate	225
Order allowing certiorari	226

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA.

Civil Action. File No. 237-J—Civil.

C. L. WILLIAMS, Individually and as duly appointed and authorized agent and representative for HERBERT AIKENS, FRANK ALEXANDER, WILLIE ANDERSON, ROBERT ATKINSON, JR., VANDY BLAKE, CHARLES BROOKS, BRITT BYTHEWOOD, CHRIS COHEN, FRANK CROCKETT, E. Z. DANIEL, JR., CLARENCE DAVIS, WILLIAM EVERETT, HENRY FOLSON, FLEMING HAWKINS, ROBERT HADLEY, J. P. HILLS, ALVIN LEWIS JONES, ERNEST JONES, SAM JONES, JAMES JOHNSON, EDDIE KITTLES, ANDREW LANG, DAVID LANGLEY, FRANK LEGGETT, CHARLES MOSES, S. W. OWNES, FRANK PARKER, HENRY PERRY, WILLIAM PETTY, EDWARD PUGH, RICHARD ROBY, CHARLES SAMPSON, J. W. SPEIGHT, BASSIE THOMAS, EDWIN A. THOMAS, LACY THOMAS, HUGH H. THOMPSON, ROBERT TOWNSELL, JAMES TOWNSELL, JOHN WALLACE, HENRY WHITE, C. L. WILLIAMS, FLEMING, WILLIAMS, FRANK WILLIAMS, HENRY WILLIAMS, JOHN WILLIAMS, AND WILLIE WILLIAMS,

Plaintiffs,

versus

JACKSONVILLE TERMINAL COMPANY, a corporation,
Defendant.

COMPLAINT.

I.

The plaintiff, C. L. Williams, is a resident of Duval County, State of Florida, and is the duly appointed and author-

ized agent of Herbert Aikens, Frank Alexander, Willie Anderson, Robert Atkinson, Jr., Vandy Blake, Charles Brooks, Britt Bythewood, Chris Cohen, Frank Crockett, E. Z. Daniel, Jr., Clarence Davis, William Everett, Henry Folson, Fleming Hawkins, Robert Hadley, J. P. Hills, Alvin Lewis Jones, Ernest Jones, Sam Jones, James Johnson, Eddie Kittles, Andrew Lang, David Langley, Frank Leggett, Charles Moses, S. W. Owens, Frank Parker, Henry Perry, William Petty, Edward Pugh, Richard Roby, Charles Sampson, J. W. Speight, Bassie Thomas, Edwin A. Thomas, Lacy Thomas, Hugh H. Thompson, Robert Townsell, James Townsell, John Wallace, Henry White, C. L. Williams, Fleming Williams, Frank Williams, Henry Williams, John Williams, and Willie Williams (hereinafter designated as plaintiffs), so appointed pursuant to Section 16 (B) of the "Fair Labor Standards Act of 1938", 29 U. S. C. A. 201 to 219 (June 25, 1938, c-676, Paragraph 1, 52 Stat. 1060).

II.

Jurisdiction is conferred upon this Court by Section 41 (8), 28 U. S. C. A. (Judicial Code) 24, conferring unto the District Court jurisdiction of "all suits and proceedings arising under any law regulating commerce"; and jurisdiction is also conferred upon this Court by Section 16 (b) of said "Fair Labor Standards Act", 29 U. S. C. A. 216.

III.

The defendant, Jacksonville Terminal Company, a corporation, was, at all times herein mentioned, and now is a corporation organized and existing under and by virtue of the laws of the State of Florida, having its principal place of business in the City of Jacksonville, Duval County, Florida, and within the Southern District of Florida, United States of America.

IV.

Plaintiffs seek to recover from defendant unpaid wages and compensation due them individually, and an additional equal amount as liquidated damages, and a reasonable attorney's fee and costs of this action, all in pursuance to Section 16 (b), "Fair Labor Standards Act", 29 U. S. C. A. 261.

V.

The defendant maintains and operates a railroad terminal and terminal facilities in the City of Jacksonville, Duval County, Florida, including ticket offices, passenger waiting rooms, restaurants, bureaus, baggage facilities, tracks, switches, light, mechanical devices, loading platforms, baggage trucks and tractors, and all other machinery necessary for the delivery to, on and off the trains, of persons, baggage, and United States Mail routed or traveling in Interstate Commerce, and used and necessary in the transportation of persons and property in Interstate Commerce.

That said facilities are operated by said defendant for the use and benefit of the Florida East Coast Railway Company, the Atlantic Coast Line Railway Company, the Seaboard Air Line Railway Company and the Pullman Company, each of said railway companies operating trains, engines, baggage cars, express cars, mail cars, passenger cars, sleeping cars and dining cars, for the transportation of United States mail, passengers and baggage in Interstate Commerce.

VI.

That the plaintiffs are each employed by the defendant as porters, ushers, attendants, messengers, and commonly designated "Red Cap", and were and are now employed by defendant to handle the

hand baggage, clothes, personal effects and traveling effects and luggage of the passengers using said terminal and to otherwise assist and aid said passengers in their passage through or sojourn in and through said terminal. That substantially all of the passengers so assisted by plaintiffs were and are in transit to, from and among the several States of the United States of America. That said plaintiffs were and are required to unload baggage of the passengers on various incoming trains from other States than the State of Florida, stopping at said station, and were and are likewise required to assist and unload passengers from said trains, and plaintiffs were and are likewise further required to help and assist the old or sick or crippled passengers and to use certain wheel chairs and stretchers furnished by the defendant to wheel or carry the passengers using said terminal, either from or to the place of embarking at said terminal or from or to the trains using said terminal.

Plaintiffs, and each of them, were so employed by the defendant from the 24th day of October, 1938; to and including the 1st day of July, 1940, and are now so employed. That under Section 6 of the "Fair Labor Standards Act of 1938", 29 U. S. C. A. 206, the defendant was required to pay to each of the plaintiffs wages of not less than twenty-five cents (.25) per hour from October 24th, 1938, to October 23rd, 1939, and wages of not less than thirty cents (.30) per hour from and after October 24th, 1939. That notwithstanding the provisions of said Act, the defendant has failed, neglected and refused to pay the plaintiffs the said minimum wage from the said 24th day of October, 1938, to the 1st day of July, 1940, but has paid said plaintiffs only a small portion thereof.

That the plaintiffs attach hereto a Bill of Particulars which contains the number of hours of employment of each of plaintiffs, upon which they were entitled to

5 twenty-five cents (.25) per hour as wages, and the number of hours of employment of each of plaintiffs, upon which they were entitled to thirty cents (.30) per hour; that said Bill of Particulars also contains the amount paid each of plaintiffs on account of said wages and the balance due each of plaintiffs on account of said wages; that the total of such balance due and owing all of the plaintiffs, is \$59,923.08.

Wherefore, the respective plaintiffs demand judgment against the defendant for the recovery of their individual wage and an additional equal amount as liquidated damages, and also in addition to the judgment that this Court will award to the plaintiffs a reasonable attorney's fee for each of plaintiffs to be paid by the defendant and the costs of this action, all pursuant to and as authorized by Section 16 (b) of said "Fair Labor Standards Act of 1938", 29 U. S. C. A. 216.

FRANK F. L'ENGLE,

(Frank F. L'Engle)

Attorney for Plaintiffs.

525 Barnett National Bank Bldg.,
Jacksonville, Florida.

6

SUMMONS.

To the above named Defendant:

You are hereby summoned and required to serve, upon Frank F. L'Engle, plaintiff's attorney, whose address is 525 Barnett National Bank Building, Jacksonville, Florida, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do

so, judgment by default will be taken against you for the relief demanded in the complaint.

EDWIN R. WILLIAMS,

Clerk of Court

By L. GIBSON HOUSE,

(Seal of Court)

Deputy Clerk.

Date: August 19, 1940.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

RETURN ON SERVICE OF WRIT.

I hereby certify and return, that on the 19th day of August 1940, I received the within summons at Jacksonville, Florida, and executed it at Jacksonville, Florida, August 19, 1940, by serving the within named Jacksonville Terminal Company by exhibiting this original writ and delivering a true copy of hereof, together with a copy of the complaint to John L. Wilkes, President of the said Jacksonville Terminal Company, and making known to him the contents of the same.

Marshal's Fees

Travel 1 mi.	\$.06
Service	2.00
	<hr/>
	\$2.06

CHESTER S. DISHONG,

United States Marshal.

By E. JACKSON BUTLER,

(E. Jackson Butler)

Deputy United States
Marshal.

Subscribed and sworn to before me, a this
day of 19...

(Seal)

ANSWER.

1. The Complaint fails to state a claim against Defendant upon which relief can be granted.

2. Defendant admits the allegations contained in Paragraphs 1, 2, 3, and 5 of the Complaint, and as to Paragraph 4 admits that plaintiffs are seeking to recover as therein alleged, but denies that any unpaid wages or compensation is due from defendant to plaintiffs, and denies that plaintiffs are entitled to recover any amount as liquidated damages, or attorney's fees and costs.

3. Answering the first division or section of Paragraph 6 of the Defendant says that all of the services performed by plaintiff and by each and every other person named in the complaint and for whom he sues, were performed within the station of the Defendant at Jacksonville, Florida, and all such related to individual passengers and hand-baggage and luggage and were performed only at the request of an individual requesting such service.

Answering the second division or section of Paragraph 6 Defendant denies and says it is not true that the Plaintiff and other persons for whom suit is brought, were employed by the Defendant on the 24th day of October 1938 up to the time of the institution of this suit in commerce and says that Section 6 of the Fair Labor Standards Act of 1938 was not applicable to their employment, and denies and says that it is not true that Defendant has

failed and neglected to pay the Plaintiff and other persons named in the Complaint a wage equal to the minimum wage provided by that Act for the period above named but says that it has paid the Plaintiff and other persons for whom he sues a sum equal to the sum provided in said Act.

And further answering the third section of Paragraph 6 Defendant says that the Bill of Particulars attached to the Complaint is not correct in its statement of hours of employment of the several persons therein named and the amount which was received as wages by each of them during the period covered by said Bill of Particulars and denies and says it is not true that there is due and unpaid to the Plaintiff or any other persons on account of wages in the sum of \$59,923.08 or any part thereof. But on the contrary says that the Defendant has paid in full to the Plaintiff and all others represented by him the full amount of the minimum wages as provided by the Fair Labor Standards Act of 1938 for such period.

4. And further answering Defendant says that payment was made in the amounts as hereinafter stated and that the hours in which plaintiff and each person represented by him worked during such time are shown by the Bill of Particulars attached.

9 5. This Defendant denies every allegation in the Complaint which is not in this Answer admitted or denied.

6. Further answering, Defendant says that prior to July 10, 1937, it had permitted red caps as licensees to be upon its premises and perform on their own account services for passengers at their express direction or request, and for such compensation as might be arranged between the red caps and the passengers, such service

consisting of the handling of hand luggage to or from trains in and about the station; that on or about July 10, 1937, the International Brotherhood of Red Caps, pursuant to Section 1, Fifth Paragraph, of the Railway Labor Act, as amended, filed a petition with the Interstate Commerce Commission (hereinafter referred to as the Commission) against certain railroads, praying that the Commission amend or interpret its orders revising and classifying employees and subordinate officials so as to include red caps in such classification. The Commission took jurisdiction of the matter and broadened the scope of its inquiry to include certain other Class I railroads, terminal companies, including this Defendant, and others, and issued a questionnaire requiring the carriers which had been made parties to the proceeding to answer, under oath, questions relating to the status of red caps. The subject was docketed by the Commission as Ex Parte No. 72 (Sub-No. 1). "In the matter of regulations concerning class of employees and subordinate officials to be included within the term 'Employee' under the Railway Labor Act." The Commission, having received answers to said questionnaires on September 29, 1938, ruled (299 I. C. C. 410) that red caps were employees within the definition contained in the Railway Labor Act, as amended. Under said order of the Interstate Commerce Commission said red caps performed said above mentioned services for passengers as employees of Defendant, said services were performed for said passengers by Defendant, and compensation paid for said services by said passengers was compensation to Defendant.

10 7. On October 24, 1938, the Fair Labor Standards Act became effective and on and after that date said red caps continued to engage in the same activities as before with respect to the performance of said services for passengers at defendant's station. Upon the taking effect of said Act, and in view of the provisions

thereof and of said above mentioned order of the Interstate Commerce Commission, Defendant in order not unduly to disrupt existing operating practices did not require red caps to pay over to defendant in cash the compensations received from passengers but to report the same to Defendant and retain the same as payment pro tanto of the minimum wage under Section 6 of the Fair Labor Standards Act and did permit the said red caps so to do.

8. Before October 24, 1938, the date on which Section 6 of the Act became effective, Defendant, in view of the foregoing and to comply with said Act, delivered to each of said red caps a notice in the following form (except that said notice was addressed to said red caps and was signed by defendant):

"In view of the requirements of the Fair Labor Standards Act, effective October 24, 1938, and in consideration of your hereafter engaging in the handling of hand baggage and travelling effects of passengers or otherwise assisting them at or about stations or destinations, it will be necessary that you report daily to the undersigned the amounts received by you as tips or remuneration for such services.

"The carrier hereby guarantees to each person continuing such service after October 24, 1938, compensation which, together with an including the sums of money received as above provided, will not be less than the minimum wage provided by law.

"You are privileged to retain subject to their being credited on such guarantee all such tips or remuneration received by you except such portion thereof as may be required of you by the undersigned for taxes of any character imposed upon you by law and collectible by the undersigned.

"All the matters above referred to are subject to the right of the carrier to determine from time to time the number and identity of persons to be permitted to engage in said work and the hours to be devoted thereto to establish rules and regulations relating to the manner, method and place of rendition of such service, and the accounting required."

11. 9. On and after October 24, 1938, each of said red caps, pursuant to said Notice, and during the period covered by this action, retained all tips which he received from passengers of Defendant, and made daily reports to Defendant of the amounts alleged by him to have been so received. In most instances the tips so received and retained equalled or exceeded the minimum wage requirement of the Act: but in all cases where the amounts so reported were less than the minimum wage requirement, Defendant paid to each red cap so reporting, the deficiency between the tips so reported and the minimum set forth in said Section 6. This arrangement has been commonly known as the "accounting and guarantee plan."

10. Defendant attaches hereto a Bill of Particulars which shows: (1) The number of hours worked by the Plaintiff and by each and every other person named in the Complaint and for whom he sues from October 24, 1938, up to July 1st, 1940; (2) The amount of compensation so called tips, reported by each one of such persons as received directly from passengers; (3) The amount received by each one of Plaintiffs directly from Defendant in addition to the amount shown as having been received by payment direct to each one of Plaintiffs by passengers and for the account of Defendant as set forth; (4) The amount of the minimum wage of each of said Plaintiffs under Section 6 of the Fair Labor Standards Act of 1938, if applicable to them.

11. Defendant denies and says that it is not true that it is indebted to C. L. Williams, individually or as duly appointed and authorized agent or representative of the other persons named in the Complaint filed herein in any amount whatsoever, and denies that he is entitled to judgment, individually or as duly appointed and authorized agent and representative for the other persons named in the Complaint for unpaid wages, for liquidated damages, for an attorney's fee, for costs, or for any other amount whatsoever.

12. Wherefore Defendant prays that Plaintiff take nothing by his suit and that Defendant have judgment adjudicating that neither Plaintiff nor any of the other persons named in Plaintiff's Complaint have any claim against Defendant, and Defendant prays for all costs herein.

JULIAN HARTRIDGE,

(Julian Hartridge)

Attorney for Defendant,
Jacksonville Terminal
Company.

304 Bisbee Building,
Jacksonville, Florida.

Received a copy of the above Answer this 9th day of
September, A. D. 1940.

FRANK F. L'ENGLE,

Attorney for C. L. Williams,
Individually, et al.

525 Barnett National Bank Bldg.,
Jacksonville, Florida.

13 Jacksonville Terminal Company

Bill of Particulars.

Total hours worked, earnings, etc., of Red Caps for
period October 24, 1938 to June 30, 1940, inclusive.

Recapitulation.

1—Total hours worked	150,416
2—Total earnings	\$40,594.69
3—Amount received directly from Jacksonville Terminal Company	\$ 8,321.33
4—Total tips applied to earnings	\$32,273.36
5—Total tips reported by Red Caps	\$35,293.12
6—Amount actually received by Red Caps over minimum wage	\$ 3,019.76

Accounting Department, Jacksonville, Florida, October
9, 1940.

BILL OF PARTICULARS.

Jacksonville Terminal Company.

Frank Crockett:

Hours Worked:

10-24-38 to 10-23-39 inc. 1,727.68 Hrs.			
@ 25¢	\$431.92		
10-24-39 to 6-30-40 inc. 910.33 Hrs. @			
30¢	273.10	\$705.02	

Amount reported as received from passengers:

10-24-38 to 10-23-39 inc.....	\$417.54		
10-24-39 to 6-30-40 inc.....	152.81	570.35	

Amount paid by Jacksonville Terminal Company:

10-24-38 to 10-23-39 inc.....	44.97		
10-24-39 to 6-30-40 inc.....	120.33	165.30	735.65

Excess over minimum wages		\$30.63	
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Christopher Cohen:

Hours worked:

10-24-38 to 10-23-39 inc. 2,326.99 hrs.			
@ .25	\$581.75		
10-24-39 to 6-30-40 inc. 1, 552.74 hrs.			
@ .30	465.82	\$1,047.57	

Amount reported as received from passengers:

10-24-38 to 10-23-39 inc.	\$596.98		
10-24-39 to 6-30-40 inc.	320.98	917.06	

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	41.04		
10-24-39 to 6-30-40 inc.	145.78	186.82	1,103.88

Excess over minimum wages	\$	56.31	
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Hugh Thompson:

Hours worked:

10-24-38 to 10-23-39 inc. 2,207.02 hrs.			
@ .25	\$551.76		
10-24-39 to 6-30-40 inc. 1,306.17 hrs.			
@ .30	391.85	\$943.61	

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	\$543.28		
10-24-39 to 6-30-40 inc.	290.78	834.06	

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	36.23		
10-24-39 to 6-30-40 inc.	101.12	137.35	971.41

Excess over minimum wages	\$27.80		
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Note: Amounts due under guarantee to insure minimum wages are computed and paid semi-monthly.

Henry White:

Hours worked:

10-24-38 to 10-23-39 inc.	2,279.54 Hrs.	
@ .25		\$569.89
10-24-39 to 6-30-40 inc.	1,570.08 Hrs.	
@ .30		471.02
		<u>\$1,040.91</u>

Amount reported as received from passengers:

10-24-38 to 10-23-39 inc.	\$664.82	
10-24-39 to 6-30-40 inc.	380.45	1,045.27
		<u></u>

Amount paid by Jacksonville Terminal Company:

10-24-38 to 10-23-39 inc.	11.63	
10-24-39 to 6-30-40 inc.	90.70	102.33
		<u>1,147.60</u>

Excess over minimum wages	\$	106.69
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James A. Johnson:

Hours worked:

10-24-38 to 10-23-39 inc.	2,623.20 hrs.	
@ .25		\$655.80
10-24-39 to 6-30-40 inc.	1,984.00 hrs.	
@ .30		595.20
		<u>\$1,251.00</u>

Amount reported as received from passengers:

10-24-38 to 10-23-39 inc.	\$696.03	
10-24-39 to 6-30-40 inc.	405.65	1,101.68
		<u></u>

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	\$ 61.47		
10-24-39 to 6-30-40 inc.	253.55	315.02	1,416.70

Excess over minimum wages \$ 165.70

Robert Hadley:

Hours worked:

10-24-38 to 10-23-39 inc. 2,331.36 hrs.		
@ .25	\$582.84	
10-24-39 to 6-30-40 inc. 1,578.17 hrs.		
@ .30	473.45	\$1,056.29

Amount, reported as received from
passengers:

10-24-38 to 10-23-39 inc.	635.13	
10-24-39 to 6-30-40 inc.	259.68	894.81

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	23.98	
10-24-39 to 6-30-40 inc.	214.13	238.11 1,132.92

Excess over minimum wages \$ 76.63

Note: Amounts due under guarantee to insure minimum wages are computed and paid semi-monthly.

Herbert Aikens:

Hours worked:

10-24-38 to 10-23-39 inc.	2,366.09 hrs.	
@ .25		\$591.52
10-24-39 to 6-30-40 inc.	1,510.09 hrs.	
@ .30		453.03 \$1,044.55

Amount reported as received from passengers:

10-24-38 to 10-23-39 inc.	\$562.79	
10-24-39 to 6-30-40 inc.	288.19	850.98

Amount paid by Jacksonville Terminal Company:

10-24-38 to 10-23-39 inc.	52.23	
10-24-39 to 6-30-40 inc.	164.88	217.11 1,068.09

Excess over minimum wages \$ 23.54

Bassie Thomas:

Hours worked:

10-24-38 to 10-23-39 inc.	2,477.67 hrs.	
@ .25		\$619.42
10-24-39 to 6-30-40 inc.	1,525.42 hrs.	
@ .30		457.63 \$1,077.05

Amount reported as received from passengers:

10-24-38 to 10-23-39 inc.	\$734.48	
10-24-39 to 6-30-40 inc.	297.27	1,031.75

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	5.92		
10-24-39 to 6-30-40 inc.	162.12	168.04	1,199.79

Excess over minimum wages \$ 122.74

Robert Townsell:

Hours worked:

10-24-38 to 10-23-39 inc. 2,414.58 hrs.		
@ .25	\$603.65	
10-24-39 to 6-30-40 inc. 1,600.75 hrs.		
@ .30	480.23	\$1,083.88

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	\$591.10	
10-24-39 to 6-30-40 inc.	283.21	874.31

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	\$ 50.94	
10-24-39 to 6-30-40 inc.	197.06	248.00 1,122.31

Excess over minimum wages \$ 38.43

Note: Amounts due under guarantee to insure minimum wages are computed and paid semi-monthly.

William Everett:

Hours worked:

10-24-38 to 10-23-39 inc. 2,333.62 hrs.		
@ .25	\$583.41	
10-24-39 to 6-30-40 inc. 1,411.67 hrs.		
@ .30	423.50	\$1,006.91

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	\$583.99	
10-24-39 to 6-30-40 inc.	308.40	892.39

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	49.66		
10-24-39 to 6-30-40 inc.	115.13	164.79	1,057.18

Excess over minimum wages	50.27
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Joe P. Hills:

Hours worked:

10-24-38 to 10-23-39 inc. 2,383.21 hrs.	
@ .25	\$595.80
10-24-39 to 6-30-40 inc. 1,615.91 hrs.	
@ .30	484.77 \$1,080.57

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	\$682.93
10-24-39 to 6-30-40 inc.	355.05 1,037.98

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	10.35	
10-24-39 to 6-30-40 inc.	133.47	143.82 1,161.80

Excess over minimum wages	101.23
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Charles Moses:

Hours worked:

10-24-38 to 10-23-39 inc.	2,455.67 hrs.	
@ .25		\$613.92
10-24-39 to 6-30-40 inc.	1,570.09 hrs.	
@ .30		471.03 \$1,084.95

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	\$649.40	
10-24-39 to 6-30-40 inc.	339.42	988.82

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	41.18	
10-24-39 to 6-30-40 inc.	132.71	173.89 1,162.71

Excess over minimum wages \$ 77.76

Robert Atkinson:

Hours worked:

10-24-38 to 10-23-39 inc.	2,312.65 hrs.	
@ .25		\$578.16
10-24-39 to 6-30-40 inc.	1,228.50 hrs.	
@ .30		368.55 \$ 946.71

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	\$678.70	
10-24-39 to 6-30-40 inc.	247.40	926.10

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	17.12		
10-24-39 to 6-30-40 inc.	121.21	138.33	1,064.43

Excess over minimum wages \$ 117.72

Note: Amounts due under guarantee to insure minimum wages are computed and paid semi-monthly.

Henry Williams:

Hours worked:

10-24-38 to 10-23-39 inc. 2,345.18 hrs.		
@ .25	\$586.30	
10-24-39 to 6-30-40 inc. 1,406.42 hrs.		
@ .30	421.93	\$1,008.23

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	\$578.77	
10-24-39 to 6-30-40 inc.	272.02	850.79

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	42.00		
10-24-39 to 6-30-40 inc.	149.93	191.93	1,042.72

Excess over minimum wages \$ 34.49

Fleming Hawkins:

Hours worked:

10-24-38 to 10-23-39 inc.	2,408.84 hrs.	
@ .25		\$602.21
10-24-39 to 6-30-40 inc.	1,581.59 hrs.	
@ .30		474.48 \$1,076.69

Amount reported as received from passengers:

10-24-38 to 10-23-39 inc.	\$701.15
10-24-39 to 6-30-40 inc.	360.79 1,061.94

Amount paid by Jacksonville Terminal Company:

10-24-38 to 10-23-39 inc.	5.46
10-24-39 to 6-30-40 inc.	113.75 119.21 1,181.15

Excess over minimum wages \$ 104.46

Britt Bythewood, Jr.:

Hours worked:

10-24-38 to 10-23-39 inc.	1,621.02 hrs.	
@ .25		\$405.26
10-24-39 to 6-30-40 inc.	548.41 hrs. @	
.30		164.52 \$ 569.78

Amount reported as received from passengers:

10-24-38 to 10-23-39 inc.	\$479.57
10-24-39 to 6-30-40 inc.	128.04 607.61

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	4.41		
10-24-39 to 6-30-40 inc.	36.50	40.91	648.52

Excess over minimum wages \$ 78.74

David Langley:

Hours worked:

10-24-38 to 10-23-39 inc. 1,166.75 hrs.		
@ .25	\$291.69	
10-24-39 to 6-30-40 inc. 1,450.93 hrs.		
@ .30	435.28	\$ 726.97

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	\$329.55	
10-24-39 to 6-30-40 inc.	293.97	623.52

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	13.76	
10-24-39 to 6-30-40 inc.	142.95	156.71 780.23

Excess over minimum wages \$ 53.26

Note: Amounts due under guarantee to insure minimum wages are computed and paid semi-monthly.

Lacy Thomas:

Hours worked:

10-24-38 to 10-23-39 inc. 1,640.83 hrs.		
@ .25	\$410.21	
10-24-39 to 6-30-40 inc. 1,090.26 hrs.		
@ .30	327.08	\$ 737.29

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	\$599.46		
10-24-39 to 6-30-40 inc.	205.52	804.98	
	<u> </u>		

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	7.57		
10-24-39 to 6-30-40 inc.	122.29	129.86	934.84
	<u> </u>	<u> </u>	<u> </u>

Excess over minimum wages \$ 197.55

Ernest Jones:

Hours worked:

10-24-38 to 10-23-39 inc. 1,096.08 hrs.			
@ .25	\$274.02		
10-24-39 to 6-30-40 inc. 1,159.17 hrs.			
@ .30	347.75	\$,621.77	
	<u> </u>		

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	\$370.92		
10-24-39 to 6-30-40 inc.	167.20	538.12	
	<u> </u>		

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	6.44		
10-24-39 to 6-30-40 inc.	180.57	187.01	725.13
	<u> </u>	<u> </u>	<u> </u>

Excess over minimum wages \$ 103.36

Alvin Louis Jones:

Hours worked:

10-24-38 to 10-23-39 inc.	1,088.07 hrs.	
@ .25		\$272.02
10-24-39 to 6-30-40 inc.	1,224.00 hrs.	
@ .30		367.20 \$ 639.22

Amount reported as received from passengers:

10-24-38 to 10-23-39 inc.	\$337.06	
10-24-39 to 6-30-40 inc.	270.73	607.79

Amount paid by Jacksonville Terminal Company:

10-24-38 to 10-23-39 inc.	16.98	
10-24-39 to 6-30-40 inc.	98.20	115.18 722.97

Excess over minimum wages \$ 83.75

James Townsell:

Hours worked:

10-24-38 to 10-23-39 inc.	1,632.71 hrs.	
@ .25		\$408.18
10-24-39 to 6-30-40 inc.	1,291.26 hrs.	
@ .30		387.38 \$ 795.56

Amount reported as received from passengers:

10-24-38 to 10-23-39 inc.	\$440.43	
10-24-39 to 6-30-40 inc.	200.13	640.56

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	33.01		
10-24-39 to 6-30-40 inc.	188.56	221.57	862.13

Excess over minimum wages \$ 66.57

Note: Amounts due under guarantee to insure minimum wages are computed and paid semi-monthly.

Frank Alexander:

Hours worked:

10-24-38 to 10-23-39 inc. 1,846.94 hrs.			
@ .25	\$461.74		
10-24-39 to 6-30-40 inc. 1,088.58 hrs.			
@ .30	326.57	\$ 788.31	

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	\$559.78		
10-24-39 to 6-30-40 inc.	212.20	771.98	

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	4.36		
10-24-39 to 6-30-40 inc.	114.41	118.77	890.75

Excess over minimum wages \$ 102.44

Frank Williams:

Hours worked:

10-24-38 to 10-23-39 inc.	2,064.54 hrs.	
@ .25		\$516.14
10-24-39 to 6-30-40 inc.	1,222.92 hrs.	
@ .30		366.88 \$ 883.02

Amount reported as received from passengers:

10-24-38 to 10-23-39 inc.	\$667.08	
10-24-39 to 6-30-40 inc.	278.50	945.58

Amount paid by Jacksonville Terminal Company:

10-24-38 to 10-23-39 inc.	4.23	
10-24-39 to 6-30-40 inc.	95.59	99.82 1,045.40

Excess over minimum wages \$ 162.38

John Williams:

Hours worked:

10-24-38 to 10-23-39 inc.	1,773.70 hrs.	
@ .25		\$443.43
10-24-39 to 6-30-40 inc.	1,018.91 hrs.	
@ .30		305.67 \$ 749.10

Amount reported as received from passengers:

10-24-38 to 10-23-39 inc.	\$472.78	
10-24-39 to 6-30-40 inc.	226.96	699.74

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	15.51		
10-24-39 to 6-30-40 inc.	79.20	94.71	794.45
Excess over minimum wages		\$	45.35

Willie Williams:

Hours worked:

10-24-38 to 10-23-39 inc. 1,449.45 hrs.			
@ .25		\$362.36	
10-24-39 to 6-30-40 inc. 1,233.16 hrs.			
@ .30		369.95	\$ 732.31

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	356.99		
10-24-39 to 6-30-40 inc.	167.95	524.94	

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	36.62		
10-24-39 to 6-30-40 inc.	203.51	240.13	765.07

Excess over minimum wages \$ 32.76

Note: Amounts due under guarantee to insure minimum wages are computed and paid semi-monthly.

Frank Leggett:

Hours worked:

10-24-38 to 10-23-39 inc.	2,601.50 hrs.	
@ .25		\$650.38
10-24-39 to 6-30-40 inc.	1,964.50 hrs.	
@ .30		589.35
		<u>\$1,239.73</u>

Amount reported as received from passengers:

10-24-38 to 10-23-39 inc.	\$621.75	
10-24-39 to 6-30-40 inc.	410.38	1,032.13
		<u></u>

Amount paid by Jacksonville Terminal Company:

10-24-38 to 10-23-39 inc.	89.73	
10-24-39 to 6-30-40 inc.	242.72	332.45
		<u>1,364.58</u>

Excess over minimum wages \$ 124.85

Edward Pugh:

Hours worked:

10-24-38 to 10-23-39 inc.	1,132.14 hrs.	
@ .25		\$283.04
10-24-39 to 6-30-40 inc.	1,425.50 hrs.	
@ .30		427.65
		<u>\$ 710.69</u>

Amount reported as received from passengers:

10-24-38 to 10-23-39 inc.	\$314.27	
10-24-39 to 6-30-40 inc.	163.10	477.37
		<u></u>

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	14.41		
10-24-39 to 6-30-40 inc.	266.21	280.62	757.99

Excess over minimum wages		\$	47.30
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Richard Roby:

Hours worked:

10-24-38 to 10-23-39 inc. 1,222.30 hrs.			
@ .25	\$305.58		
10-24-39 to 6-30-40 inc. 1,112.25 hrs.			
@ .30	333.68	\$	639.26

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	\$389.28		
10-24-39 to 6-30-40 inc.	234.26	623.54	

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	3.20		
10-24-39 to 6-30-40 inc.	103.05	106.25	729.79

Excess over minimum wages		\$	90.53
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Charles Sampson:

Hours worked:

10-24-38 to 10-23-39 inc. 1,192.80 hrs.			
@ .25	\$298.20		
10-24-39 to 6-30-40 inc. 618.50 hrs. @			
.30	185.55	\$	483.75

Amount reported as received, from
passengers:

10-24-38 to 10-23-39 inc.	\$284.70	
10-24-39 to 6-30-40 inc.	138.84	423.54
	<u> </u>	

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	31.99	
10-24-39 to 6-30-40 inc.	47.57	79.56 \$ 503.10
	<u> </u>	<u> </u>

Excess over minimum wages \$ 19.35

Note: Amounts due under guarantee to insure minimum wages are computed and paid semi-monthly.

John Wallace:

Hours worked:

10-24-38 to 10-23-39 inc. 1,571.70 hrs.	
@ .25	\$392.93
10-24-39 to 6-30-40 inc. 1,268.83 hrs.	
@ .30	380.65 \$ 773.58
	<u> </u>

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	\$451.55	
10-24-39 to 6-30-40 inc.	276.45	728.00
	<u> </u>	

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	5.32	
10-24-39 to 6-30-40 inc.	104.98	110.30 838.30
	<u> </u>	<u> </u>

Excess over minimum wages \$ 64.72

Ezekiel Z. Daniel, Jr.:

Hours worked:

10-24-38 to 10-23-39 inc.	1,386.85 hrs.		
@ .25			\$346.71
10-24-39 to 6-30-40 inc.	1,079.50 hrs.		
@ .30		323.85	\$ 670.56

Amount reported as received from passengers:

10-24-38 to 10-23-39 inc.	\$331.35	
10-24-39 to 6-30-40 inc.	195.62	526.97

Amount paid by Jacksonville Terminal Company:

10-24-38 to 10-23-39 inc.	33.74		
10-24-39 to 6-30-40 inc.	128.27	162.01	688.98

Excess over minimum wages \$ 18.42

Frank Parker:

Hours worked:

10-24-38 to 10-23-39 inc.	1,005.25 hrs.		
@ .25			\$251.31
10-24-39 to 6-30-40 inc.	803.00 hrs.		
@ .30		240.90	\$ 492.21

Amount reported as received from passengers:

10-24-38 to 10-23-39 inc.	\$216.58	
10-24-39 to 6-30-40 inc.	169.60	386.18

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	41.05		
10-24-39 to 6-30-40 inc.	71.35	112.40	498.58

Excess over minimum wages \$ 6.37

Sam Jones:

Hours worked:

10-24-38 to 10-23-39 inc. 1,630.46 hrs.		
@ .25	\$407.62	
10-24-39 to 6-30-40 inc. 1,329.51 hrs.		
@ .30	398.85	\$ 806.47

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	\$398.35	
10-24-39 to 6-30-40 inc.	304.55	702.90

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	30.37	
10-24-39 to 6-30-40 inc.	95.95	126.32 829.22

Excess over minimum wages \$ 22.75

Note: Amounts due under guarantee to insure minimum wages are computed and paid semi-monthly.

Edwin A. Thomas:

Hours worked:

10-24-38 to 10-23-39 inc.	1,203.65 hrs.	
@ .25		\$300.91
10-24-39 to 6-30-40 inc.	1,134.00 hrs.	
@ .30		340.20 \$ 641.11

Amount reported as received from passengers:

10-24-38 to 10-23-39 inc.	\$410.43	
10-24-39 to 6-30-40 inc.	218.59	629.02

Amount paid by Jacksonville Terminal Company:

10-24-38 to 10-23-39 inc.	5.54	
10-24-39 to 6-30-40 inc.	121.64	127.18 756.20

Excess over minimum wages \$ 115.09

Note: Amounts due under guarantee to insure minimum wages are computed and paid semi-monthly.

Edward Kittles:

Hours worked:

10-24-38 to 10-23-39 inc.	2,189.97 Hrs.	
@ .25		\$547.49
10-24-39 to 6-30-40 inc.	1,304.24 Hrs.	
@ .30		391.27 \$ 938.76

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	\$486.67	
10-24-39 to 6-30-40 inc.	260.48	747.15

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	55.40		
10-24-39 to 6-30-40 inc.71		
October, 1940	167.06	223.17	970.32

Excess over minimum wages \$ 31.56.

Henry Folson:

Hours worked:

10-24-38 to 7-31-39 inc. 1,950.20 Hrs.		
@ .25	\$487.55	
8-1-39 to 10-23-39 inc. 441.59 Hrs. @		
.25	110.40	
10-24-39 to 6-30-40 inc. 1,597.83 Hrs.		
@ .30	479.35	\$1,077.30

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	\$499.86	
10-24-39 to 6-30-40 inc.	276.02	775.88

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	58.80		
10-24-39 to 6-30-40 inc.	203.38		
October, 1940	54.74	316.92	1,092.80

Excess over minimum wages \$ 15.50

* Fleming Williams, Jr.:

Hours worked:

10-24-38 to 7-31-39 inc. 1,885.30 Hrs.	
@ .25	\$471.33
- 8-1-39 to 10-23-39 inc., None @ .25	
10-24-39 to 6-30-40 inc., None @ .30	\$ 471.33

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	\$388.64
10-24-39 to 6-30-40 inc.	None 388.64

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	\$ 45.00
10-24-39 to 6-30-40 inc.	None
October, 1940	45.25 90.25 478.89

Excess over minimum wages \$ 7.56

Noe: Amounts due under guarantee to insure minimum wages are computed and paid semi-monthly.

* Henry Perry:

Hours worked:

10-24-38 to 10-23-39 inc. 2,421.32 Hrs.	
@ .25	\$605.33
10-24-39 to 6-30-40 inc. 1,433.84 Hrs.	
@ .30	430.15 \$1,035.48

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	\$624.92	
10-24-39 to 6-30-40 inc.	251.53	876.45
	<u> </u>	

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	37.88	
10-24-39 to 6-30-40 inc.	77.20	
October, 1940	114.10	229.18 1,105.63
	<u> </u>	<u> </u>

Excess over minimum wages \$ 70.15

Charles L. Williams:

Hours worked:

10-24-38 to 7-31-39 inc. 1,979.20 Hrs.	
@ .25	\$494.80
8-1-39 to 10-23-39 inc. 458.08 Hrs. @ .25	114.52
10-24-39 to 6-30-40 inc. 1,691.83 Hrs.	
@ .30	507.55 \$1,116.87
	<u> </u>

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	\$576.27	
10-24-39 to 6-30-40 inc.	323.62	899.89
	<u> </u>	

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	55.00	
10-24-39 to 6-30-40 inc.	183.98	
October, 1940	26.69	265.67 1,165.56
	<u> </u>	<u> </u>

Excess over minimum wages \$ 48.69

John W. Speights:

Hours worked:

10-24-38 to 7-31-39 inc. 1,671.35 Hrs.			
@ .25	\$417.84		
8-1-39 to 10-23-39 inc. 255.18 Hrs. @ .25	63.80		
10-24-39 to 6-30-40 inc. 1,245.25 Hrs.			
@ .30	372.68	\$	854.32

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	\$380.07		
10-24-39 to 6-30-40 inc.	252.67	632.74	

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	40.00		
10-24-39 to 6-30-40 inc.	2.31		
October, 1940	191.66	233.97	866.71

Excess over minimum wages \$ 12.39

Note: Amounts due under guarantee to insure minimum
wages are computed and paid semi-monthly.

Clarence Davis:

Hours worked:

10-24-38 to 7-31-39 inc. 1,807.45 Hrs.			
@ .25	\$451.86		
8-1-39 to 10-23-39 inc. 417.55 Hrs. @ .25	104.39		
10-24-39 to 6-30-40 inc. 1,371.42 Hrs.			
@ .30	411.43	\$	967.68

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	\$511.49		
10-24-39 to 6-30-40 inc.	247.18	758.67	
	<hr/>		

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	55.14		
10-24-39 to 6-30-40 inc.	164.28		
October, 1940	14.60	234.02	992.69
	<hr/>	<hr/>	<hr/>

Excess over minimum wages \$ 25.01

Charles Brooks:

Hours worked:

10-24-38 to 10-23-39 inc. 2,455.05 Hrs.			
@ .25		\$613.76	
10-24-39 to 6-30-40 inc. 1,513.34 Hrs.			
@ .30		454.00	\$1,067.76
		<hr/>	<hr/>

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	\$649.77		
10-24-39 to 6-30-40 inc.	331.71	981.48	
	<hr/>		

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	19.08		
10-24-39 to 6-30-40 inc.	None		
October, 1940	144.16	163.24	1,144.72
	<hr/>	<hr/>	<hr/>

Excess over minimum wages \$ 76.96

Silas W. Owens:

Hours worked:

10-24-38 to 7-31-39 inc. 1,286.10 Hrs.		
@ .25	\$321.53	
8-1-39 to 10-23-39 inc. 118.10 Hrs. @ .25	29.53	
10-24-39 to 6-30-40 inc. 105.75 Hrs. @		
.30	31.73	\$ 382.79

Amount reported as received from passengers:

10-24-38 to 10-23-39 inc.	\$182.96	
10-24-39 to 6-30-40 inc.	14.67	197.63

Amount paid by Jacksonville Terminal Company:

10-24-38 to 10-23-39 inc.	20.45		
10-24-39 to 6-30-40 inc.20		
October, 1940	166.61	187.26	384.89

Excess over minimum wages \$ 2.10

Note: Amounts due under guarantee to insure minimum wages are computed and paid semi-monthly:

Vandy Blake:

Hours worked:

10-24-38 to 7-31-39 inc. 1,569.60 Hrs.		
@ .25	\$392.40	
8-1-39 to 10-23-39 inc. 349.88 Hrs. @ .25	87.47	
10-24-39 to 6-30-40 inc. 1013.17 Hrs.		
@ .30	303.95	\$ 783.82

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	\$407.72	
10-24-39 to 6-30-40 inc.	169.30	577.02

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	50.00	
10-24-39 to 6-30-40 inc.	134.68	
October, 1940	43.44	228.12 805.14

Excess over minimum wages \$ 21.32

Andrew Lang:

Hours worked:

10-24-38 to 7-31-39 inc. 1,971.10 Hrs.		
@ .25	\$492.78	
8-1-39 to 10-23-39 inc. 463.75 Hrs. @ .25	115.94	
10-24-39 to 6-30-40 inc. 1,473.84 Hrs.		
@ .30	442.15	\$1,050.87

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	\$503.63	
10-24-39 to 6-30-40 inc.	198.33	701.96

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	50.00	
10-24-39 to 6-30-40 inc.	133.34	
October, 1940	176.33	359.67 1,061.63

Excess over minimum wages \$ 10.76

William Petty:

Hours worked:

10-24-38 to 7-31-39 inc. 1,802.40 Hrs.		
@ .25	\$450.60	
8-1-39 to 10-23-39 inc. 385.42 Hrs. @ .25	96.36	
10-24-39 to 6-30-40 inc. 1,423.09 Hrs.		
@ .30	426.93	\$ 973.89

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	\$525.04	
10-24-39 to 6-30-40 inc.	322.36	847.40

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	57.17	
10-24-39 to 6-30-40 inc.	104.59	
October, 1940	11.03	172.79 1,020.19

Excess over minimum wages \$ 46.30

Note: Amounts due under guarantee to insure minimum wages are computed and paid semi-monthly.

Willie A. Anderson:

Hours worked:

10-24-38 to 10-23-39 inc. 1,405.25 Hrs.		
@ .25	\$351.31	
10-24-39 to 6-30-40 inc. 1,226.25 Hrs.		
@ .30	367.88	\$ 719.19

Amount reported as received from
passengers:

10-24-38 to 10-23-39 inc.	\$426.65	
10-24-39 to 6-30-40 inc.	308.80	735.45

Amount paid by Jacksonville Terminal
Company:

10-24-38 to 10-23-39 inc.	3.33		
10-24-39 to 6-30-40 inc.65		
October, 1940	61.28	65.26	800.71

Excess over minimum wages \$ 81.52

Note: Amounts due under guarantee to insure minimum wages are computed and paid semi-monthly.

29 MOTION FOR SUMMARY JUDGMENT AND
NOTICE OF MOTION.

Comes now the Defendant and moves for a judgment in favor of Jacksonville Terminal Company, Defendant, and as a part of said Motion attaches the Affidavit of John L. Wilkes.

This Motion is made under Rule 56 of the Federal Rules of Civil Procedure.

Dated this 16th day of September, A. D. 1940.

JULIAN HARTRIDGE,

(Julian Hartridge)

Attorney for Defendant,
Jacksonville Terminal
Company.

304 Bisbee Building,
Jacksonville, Florida.

To: Frank F. L'Engle, Esq., Attorney for Plaintiffs,
525 Barnett Bank Bldg., Jacksonville, Florida.

Please take notice, that the undersigned will bring the above Motion on for hearing before this Court, at its rooms in the United States Court and Post Office Building, Jacksonville, Florida, on the 27th day of September, A. D. 1940, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated this 16th day of September, A. D. 1940.

JULIAN HARTRIDGE,

(Julian Hartridge)

Attorney for Defendant,
Jacksonville Terminal
Company.

304 Bisbee Building,
Jacksonville, Florida.

Received a copy of the above Motion and Notice this
16th day of September, A. D. 1940.

CAROL L. COLEMAN for

FRANK F. L'ENGLE,

Attorney for C. L. Williams,
Individually, et al.

525 Barnett National Bank Bldg.,
Jacksonville, Florida.

30

AFFIDAVIT.

State of Florida,
County of Duval, ss.

Before me, a Notary Public in and for said State and County, personally appeared John L. Wilkes, to me well known, who being by me first duly sworn deposes and

says: I am President and General Manager of Jacksonville Terminal Company; I am now and was in actual and personal control and direction of the operations of that company during the period covered by the suit of C. L. Williams, et al, vs. Jacksonville Terminal Company, now pending; that I had charge of the books and accounts of the Company during that period; that I am familiar with the operations of the Company and with the work performed by the red caps and the manner in which it was performed; that I have read the Answer and the Bill of Particulars which was filed with the Answer and that the matters set forth in the Answer and particularly in paragraphs 3, 4, 6, 7, 8, 9, 10 and 11 are true and that the Notice set forth in paragraph 8 of the Answer was given to each of the Plaintiffs on or before October 24th, 1938, and that the reports of amounts received from passengers as set forth in the Bill of Particulars were made by each of the Plaintiffs as therein prescribed, and that the amounts therein set forth as paid by the Jacksonville Terminal Company were so paid and that the said Bill of Particulars was made up by the Accounting Department of the Jacksonville Terminal Company under my personal supervision and direction and that the said Bill of Particulars is true in substance and in fact and detail as therein set forth, and that the statement of the number of hours worked by each of the Plaintiffs is true and correct and that payment was made to each of the plaintiffs in the amounts and in the manner as set forth in the Answer and in the Bill of Particulars.

31

JOHN L. WILKES.

(Notarial Seal)

Sworn to and subscribed before me this 16th day of September, A. D. 1940.

J. N. MOORE,

Notary Public State of Florida
at Large.

My Commission Expires Nov. 24, 1941.

STIPULATION.

It Is Hereby Stipulated And Agreed, by and between counsel for the respective parties, as follows:

32 1. That the defendant is engaged in Interstate Commerce defined under the "Fair Labor Standards Act of 1938", 29 U. S. C. A. 201 to 219 (June 25, 1938, c. 676, paragraph 1, 52 Stat. 1060).

2. That C. L. Williams, and each and every the other plaintiffs named in the complaint filed in this cause, were employees of Jacksonville Terminal Company, a corporation, defendant, from July 10, 1937, to and including the date of filing the complaint on file herein, as defined by the "Fair Labor Standards Act, 1938", 29 U. S. C. A. 201 to 219 (June 25, 1938, c. 676 paragraph 1, 52 Stat. 1060).

3. That C. L. Williams and each and every the other plaintiffs named in the complaint filed in this cause, while so employed by the defendant were engaged in Interstate Commerce as defined by the "Fair Labor Standards Act, 1938", 29 U. S. C. A. 201 to 219 (June 25, 1938, c. 676, paragraph 1, 52 Stat. 1060).

4. That the Bill of Particulars attached to the Answer correctly shows, for the period October 24, 1938 to October 23, 1939, inclusive, and for the period October 24, 1939 to June 30, 1940, inclusive:

(a) The number of hours worked by each one of the Plaintiffs.

(b) The amount received by each of the Plaintiffs from passengers.

(c) The amount paid to each of Plaintiffs by Defendant by check drawn against the funds of Defendant.

FRANK F. L'ENGLE,
(Frank F. L'ENGLE)
Attorney for C. L. Williams,
Individually, et al, plain-
tiffs.

525 Barnett National Bank Bldg.,
Jacksonville, Florida.

JULIAN HARTRIDGE,
(Julian Hartridge)
Attorney for Defendant,
Jacksonville Terminal
Company.

304 Bisbee Building,
Jacksonville, Florida.

33 MOTION FOR SUMMARY JUDGMENT AND
NOTICE.

Please take notice that upon the Complaint and Answer and Stipulation of the respective parties by their respective counsel, and the depositions, the undersigned will move this Court, in Chambers in the Federal Building, Jacksonville, Florida, at 10:00 o'clock in the forenoon of the 17th day of October, A. D. 1940, or as soon thereafter as counsel can be heard, for an Order giving Summary Judgment to the plaintiffs, pursuant to Rule 56 of the Federal Rules of Civil Procedure, because the pleadings and depositions and affidavits of plaintiffs show there is no genuine issue as to any material fact and that the cross-movants are

entitled to judgment as a matter of law, and for such other and further relief as the Court may deem just, with costs.

FRANK F. L'ENGLE,

(Frank F. L'Engle)

Attorney for Plaintiffs, C. L.
Williams, Individually, et
al.

525 Barnett National Bank Building,
Jacksonville, Florida.

Received copy of the foregoing Motion and Notice this
7th day of October, A. D. 1940, and hereby accept service.

JULIAN HARTRIDGE,

(Julian Hartridge)

Attorney for Defendant
Jacksonville Terminal
Company.

304 Bisbee Building;
Jacksonville, Florida.

STIPULATION.

It Is Hereby Stipulated And agreed by and between
Counsel for the respective parties, this 10th day of Octo-
ber, A. D. 1940, as follows:

1. That the Bill of Particulars attached to the Answer
of Defendant and filed September 9th, 1940, be amended
in the following particulars, otherwise to remain in full
force and effect; this amendment to be effective as of
September 9th, 1940: By striking the Recapitula-
tion and the Bill of Particulars filed September
9th, 1940, as to the following named individuals,
but retaining the Bill of Particulars as to each and every

other individual named, and substituting therefor the Recapitulation and Bill of Particulars hereto attached as to each of the following named individuals, to-wit:

Edward Kittles,
Henry Folson,
Fleming Williams, Jr.,
Henry Perry,
Charles L. Williams,
John W. Speights,
Clarence Davis,
Charles Brooks,
Silas W. Owens,
Vandy Blake,
Andrew Lange,
William Petty,
Willie A. Anderson.

2. That the Stipulation previously entered into by and between counsel and filed in this Court October 7th, 1940, extend to and include the amendment to the Bill of Particulars and to the Bill of Particulars as amended, and that the said Stipulation filed October 7th, 1940, remain and continue in full force and effect.

FRANK F. L'ENGLE,

(Frank F. L'Engle)

Attorney for C. L. Williams,
Individually, et'al, Plaintiffs.

525 Barnett National Bank Building,
Jacksonville, Florida.

JULIAN HARTRIDGE,

(Julian Hartridge)

Attorney for Defendant,
Jacksonville Terminal
Company.

304 Bisbee Building,
Jacksonville, Florida.

35 (Depositions and Exhibits before Raleigh Downing, and R. W. Pattison, Notaries Public, and offered in evidence at the hearing on Motions for Summary Judgment of both parties before Curtis L. Waller, United States District Judge at Jacksonville, Florida, October 17th, 1940.)

Appearances:

Frank F. L'Engle, Esquire, and Montague Rosenberg, Esquire, attorneys for plaintiffs.

Julian Hartridge, Esquire, attorney for defendant.

Mr. L'Engle:

Testimony of two additional witnesses, other than the witnesses named in the notice, to-wit, Frank Leggett and C. L. Williams will be taken by consent of counsel at this hearing rather than the necessity of serving an additional notice.

Stipulation:

The defendant admits that the following original and copies of letters and telegrams all of which are here submitted from Mr. Wooten to Mr. Wilkes and from Mr. Wilkes to Mr. Wooten are genuine.

Mr. L'Engle:

Plaintiffs offer in evidence for identification original letter on the letter head of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, signed by L. L. Wooten, General Chairman, dated November 14, 1938, and it is agreed that all copies of letters from Mr. Wooten to Mr. Wilkes are copies of original letters on the same stationery.

The original letter referred to was received and filed for identification as Plaintiffs' Identification Exhibit No. 1.

Mr. L'Engle:

Plaintiffs offer in evidence for identification copy of letter dated October 25, 1938.

36 The said letter referred to was received and filed for identification as Plaintiffs' Identification Exhibit No. 1-A.

Mr. L'Engle:

Plaintiffs offer in evidence for identification copy of letter dated November 16, 1938.

Said letter referred to was received and filed for identification as Plaintiffs' Identification Exhibit No. 2.

Mr. L'Engle:

Plaintiffs offer in evidence copy of letter dated November 26, 1938.

Said letter referred to was received and filed for identification as Plaintiffs' Identification Exhibit No. 3.

Mr. L'Engle:

Plaintiffs offer in evidence copy of letter dated November 30, 1938, to which is attached copy of the proposed agreement noted in the first paragraph of the letter.

Said letter referred to was received and filed for identification as Plaintiffs' Identification Exhibit No. 4.

Mr. L'Engle:

Plaintiffs offer in evidence copy of letter dated September 7, 1938.

Said letter referred to was received and filed for identification as Plaintiffs' Exhibit No. 5, for Identification.

Mr. L'Engle:

Plaintiffs offer in evidence copy of letter dated January 13, 1939.

Said letter referred to was received and filed for identification as Plaintiffs' Identification Exhibit No. 6.

Mr. L'Engle:

Plaintiffs offer in evidence copy of letter dated February 8, 1939.

37. Said letter referred to was received and filed for identification as Plaintiffs' Identification Exhibit No. 7.

Mr. L'Engle:

Plaintiffs offer in evidence copy of letter dated February 20, 1939.

Said letter referred to was received and filed for identification as Plaintiffs' Identification Exhibit No. 8.

Mr. L'Engle:

Plaintiffs offer in evidence copy of letter dated March 5, 1939.

Said letter referred to was received and filed for identification as Plaintiffs' Identification Exhibit No. 9.

Mr. L'Engle:

Plaintiffs offer in evidence copy of telegram dated March 20, 1939.

Said telegram referred to was received and filed for identification as Plaintiffs' Identification Exhibit No. 10.

Mr. L'Engle:

Plaintiffs offer in evidence copy of letter dated June 2, 1939, to which is attached copy of letter of May 26, 1939.

Said letters referred to were received and filed for identification as Plaintiffs' Identification Exhibit No. 11.

Mr. L'Engle:

Plaintiffs offer in evidence copy of letter dated May 26, 1939, which is identical with the letter of May 26th attached to letter of June 2, agreement between Jacksonville Terminal Company and Brotherhood of Railway and Steamship Clerks which is signed by J. L. Wilkes president and general manager of Jacksonville Terminal Company and by L. L. Wooten, General Chairman, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, and in the last paragraph thereof provides in part, "This agreement shall be effective June 16, 1939", the above description being for the purpose of identification.

Said letter referred to was received and filed for identification as Plaintiffs' Exhibit No. 12.

Mr. L'Engle:

Plaintiffs offer in evidence copy of letter dated July 8, 1940.

Said letter referred to was received and filed for identification as Plaintiffs' Identification Exhibit No. 13.

Mr. L'Engle:

Plaintiffs offer in evidence copy of letter dated July 25, 1940.

Said letter referred to was received and filed for identification as Plaintiffs' Identification Exhibit No. 14.

Mr. L'Engle:

Plaintiffs offer in evidence copy of letter of August 2, 1940.

Said letter referred to was received and filed for identification as Plaintiffs' Identification Exhibit No. 15.

Mr. L'Engle:

Plaintiffs offer in evidence copy of letter of August 7, 1940.

Said letter referred to was received and filed for identification as Plaintiffs' Identification Exhibit No. 16.

Mr. L'Engle:

Plaintiffs offer in evidence copy of letter dated August 17, 1940.

Said letter referred to was received and filed for identification as Plaintiffs' Identification Exhibit No. 17.

Mr. L'Engle:

Plaintiffs offer in evidence copy of notice to red caps.

39

Said notice referred to was received and filed for identification as Plaintiffs' Identification Exhibit No. 18.

Mr. L'Engle:

The letters, telegrams and exhibits beginning with Exhibit No. 19 and ending with Exhibit No. 32 are copies of original letters written by Mr. Wilkes to Mr. Wooten and copies of telegrams sent by Mr. Wilkes to Mr. Wooten and copy of agreement entered into between the defendant Jacksonville Terminal Company and Mr. Wooten of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Station and Express Employees, dated August

9, 1940. Letter from Mr. Wilkes to Mr. Wooten, dated October 27, 1928, No. 19.

Said letter referred to was received and filed for identification as Plaintiffs' Identification Exhibit No. 19.

Mr. L'Engle:

Plaintiffs offer in evidence copy of letter of November 15, 1938.

Said letter referred to was received and filed for identification as Plaintiffs' Identification Exhibit No. 20.

Mr. L'Engle:

Plaintiffs offer in evidence copy of letter dated November 16, 1938.

Said letter referred to was received and filed for identification as Plaintiffs' Identification Exhibit No. 21.

Mr. L'Engle:

Plaintiffs offer in evidence copy of telegram from Mr. Wilkes to Mr. Wooten dated February 10, 1939.

Said telegram referred to was received and filed for identification as Plaintiffs' Identification Exhibit No. 22.

Mr. L'Engle:

Plaintiffs offer in evidence copy of letter dated February 21, 1939.

40. Said letter referred to was received and filed for identification as Plaintiffs' Identification Exhibit No. 23.

Mr. L'Engle:

Plaintiffs offer in evidence copy of telegram dated March 20th, 1939.

Said telegram referred to was received and filed for identification as Plaintiffs' Identification Exhibit No. 24.

Mr. L'Engle:

Plaintiffs offer in evidence copy of telegrams dated June 3, 1939.

Said telegrams referred to were received and filed for identification as Plaintiffs' Identification Exhibits Nos. 25 and 26.

Mr. L'Engle:

Plaintiffs offer in evidence copy of letter of July 2, 1940.

Said letter referred to was received and filed for identification as Plaintiffs' Exhibit No. 27, for Identification.

Mr. L'Engle:

Plaintiffs offer in evidence copy of letter of July 24, 1940.

Said letter referred to was received and filed for identification as Plaintiffs' Exhibit No. 28, for Identification.

Mr. L'Engle:

Plaintiffs offer in evidence copy of letter of August 7, 1940.

Said letter referred to was received and filed for identification as Plaintiffs' Identification Exhibit No. 29.

Mr. L'Engle:

Plaintiffs offer in evidence agreement of August 9, 1940.

41 Said agreement referred to was received and filed for identification as Plaintiffs' Identification Exhibit No. 30.

Mr. L'Engle:

Plaintiffs offer in evidence copy of letter dated August 14, 1940.

Said letter referred to was received and filed for identification as Plaintiffs' Identification Exhibit No. 31.

Mr. L'Engle:

Mr. Hartridge, I understand now that we have before the Examiner certain letters, telegrams and copies of certain agreements and notices, the genuineness of which is admitted, I understand, by each of the parties, that is, the actual sending and receipt by the receiver is admitted?

These letters are now offered in evidence by plaintiffs as Plaintiffs' Exhibit Nos. 1 to 31.

Mr. Hartridge:

The defendant reserves the right to make such objections that he may object to any or all of the correspondence at the time of the hearing or at the time of any subsequent proceedings in this cause.

Mr. L'Engle:

To which reservation the plaintiffs object on the following grounds:

(1) That this is a hearing under the Federal rules after notice and any objections to the introduction of the letters should come at this time to enable the plaintiffs to meet such objections if the same are objectionable.

Mr. Hartridge:

The defendant objects to the introduction of each and all, not waiving any additional objections or motion it

42 may have on additional grounds on the ground that the same are incompetent, immaterial and irrelevant and reserves the right to make objections specifically at the time.

The letters, telegrams, and agreements referred to and identified were received and filed in evidence and marked Plaintiffs' Exhibit Nos. 1 to 31, both inclusive.

MR. JOHN L. WILKES was produced and sworn as a witness on behalf of the plaintiff and testified as follows:

Direct Examination.

By Mr. L'Engle:

Q. In the answer, Mr. Wilkes, to the complaint on file in this case, there is attached a bill of particulars indicating, among other things that some of the plaintiffs, designated as red caps, were classified by your company as handicapped workers. I will ask you please, if any of those red caps which are identified as handicapped workers have a certificate by the Administrator, or if you, representing your company, or your company, ever made application to the Administrator, which application was joined in by any one of the handicapped workers for certificate under which the law permitted or allowed your company to employ these men so designated as handicapped workers under the wage minimum constituting the Fair Labor Standards Act of 1938.

A. The answer to the question is no. I would like to qualify that answer.

Q. You may answer the question, Mr. Wilkes. You may make any answer you wish to the question.

A. The answer is no. The arrangement under which the handicapped workers were rated were worked
43 out as a matter of agreement between representatives of the red caps, Frank Leggett and myself

in conference. It was not the result of any arrangement at Washington.

Q. At or about what time, Mr. Wilkes, was this arrangement made, this arrangement you speak of made?

A. I could not answer that question, exactly, but it was made not a great time after the accident went into effect. I know it was sometime during the time that negotiations were with the red-caps under assigned hours for the purpose of the men working during our arrangements with them. I would have to refer to my file, which I don't have with me, to be exact on the date. I know that Frank Leggett told me whatever arrangement we worked out would be satisfactory.

Q. Did you for your company or your company ever receive any certificate from the Administrator as to the handicapped workers about putting them to work under a handicap by physical disability or disability that might impair their working ability with the others engaged by your company in the same kind and class of employment?

A. Red caps, no.

Q. What wage scale and rate of pay was your company paying these plaintiffs between the date of July 1, 1940, and August 15, 1940?

A. Thirty cents per hour minimum for red caps.

Q. The exhibit filed before the Examiner today, and being Exhibit No. 13, which is an agreement to become effective as of the 16th day of June, 1939, did these plaintiffs work for your company under the terms of that agreement?

A. Yes.

Q. How long were the terms of that agreement in force between your company and these plaintiffs?

A. Until about July 1, 1940.

44 Q. An agreement filed before the Examiner as Exhibit dated August 9, 1940; these men worked for your company under the terms of that agreement, did they?

A. Yes, all the red caps worked under the terms of that agreement and supplemental agreements, and the agreements became effective July 1, 1940.

Q. Then the agreement of June 16, 1939, and the agreement of August 9, 1940, are the only two agreements your company has had with these men since the effective date of the Wage and Hour Law?

A. That is correct. Both are in effect at the present time.

Q. Is it not a fact that subsequent to the future negotiations that you had with Mr. Wooten that your company has recognized Mr. Wooten as the bargaining agent for the red caps at your Terminal Company?

Mr. Hartridge:

You understand I am reserving the right to object to all this, the same reservation throughout the entire examination.

Mr. Wilkes, you are not obliged to answer any question categorically. You can say who Mr. Wooten was and state the facts with regard to your relations with him. You are not obliged to draw any conclusions.

Mr. L'Engle: (Addressing the Reporter):

Mr. Examiner, will you read the question to me?

(The question was read to counsel).

A. Mr. Wooten has done all the bargaining and consulting with me in regard to red caps, although I have not at all times agreed with his conclusions. Mr. Wooten has come to see me in regard to the red caps. He
45 stated he had the entire authority of each red cap to represent him, and then later he stated that under the law they had a right to be represented by a representative of their own choice or an organization of

their choice, and we signed the agreement which the Brotherhood of Railway Clerks represented the red caps that was signed by Mr. Wooten for that organization and by myself for the Jacksonville Terminal Company.

Q. And this agreement, this one of the effective date of June 16, 1939, and the one dated August 9, 1940, were signed by Mr. Wooten as chairman of the Brotherhood of Railway and Steamship Clerks organization?

A. That is right.

Q. And they are still working under that agreement?

A. Yes, sir.

Q. Your negotiations in regard to the working agreements or any working agreement or wage scale as far as the red caps are concerned have been with Mr. Wooten?

A. With one exception, we worked out with the local committee, Frank Leggett, worked out with me negotiations on behalf of the red caps that were disabled.

Q. Subsequent to that negotiation you are speaking of, did Mr. Wooten also discuss with you the matter of the handicapped workers?

A. I am inclined to think he did. At any rate I know we talked about the arrangement we had made in regard to such handicapped workers. I think Mr. Wooten and I discussed that.

Q. On July 2nd, 1940, you wrote Mr. Wooten a letter concerning some of the handicapped workers, did you not?

A. Yes, but your preceding question said immediately subsequent to the arrangement that we originally
46 made through negotiations with Frank Leggett. The letter of July 2, 1940, is very much subsequent to that.

Q. But you did have correspondence with Mr. Wooten concerning certain handicapped workers of July 2, 1940?

A. Yes.

Q. Do you remember whether or not you had any conversation with Mr. Wooten in between the time you had

this alleged conference with Frank Leggett and this letter of July 2, 1940?

A. I am quite sure we did. I don't remember the date of the occasion, but I am quite sure we did have conversation.

Q. Mr. Wilkes, prior to this meeting of the committee that you have described to us, in reference to handicapped workers, had you any knowledge of the Fair Labor Standards Act?

A. Yes, I think so.

Q. Did you know of the provision in the Fair Labor Standards Act in reference to obtaining certificates from the Administrator in regard to working handicapped workers?

A. Yes, I did.

Q. Did you know the provision in that act or any rule of the Administration under his authority in the act, that application for working handicapped men had to be made on a form furnished by the Administrator?

A. I did find out later that that was rather a rigid rule and requirement. My impression prior to that was where we reached an understanding with the representatives of the men it was not necessary to go through that red tape. I found out afterwards, however, that it was more or less a strenuous requirement.

47 Q. The law was not changed at any time from the time you made your first examination or became acquainted with it up to the time of the first conference you had with Frank Leggett in regard to these handicapped workers?

A. Not to my knowledge. I am not a lawyer. I don't think it was.

Q. Mr. Wilkes, your company was paying these men under a plan designated commonly as the Guarantee and Accounting System from the effective date of this act to July 1, 1940, is that true?

A. That is correct.

Q. Now, will you give us a short statement as to what that accounting and guarantee system means?

A. An accounting and guarantee system under which we were operating prior to July 1, 1940, is very clearly described in our answer as well as in the notice which I have put out to the red caps. It simply means this: That the men would keep a record of the amount of money which they received.

Q. From what source?

A. That they received from passengers or others by whom they were employed to carry baggage and so forth, and the numbers of hours they worked—I am speaking of my own company now.

Q. That is all we are interested in.

A. And that was inscribed in the handwriting of the red cap himself on a daily time card which was turned into the management with both the amounts and the hours and signed by the red cap. The management then entered on its daily time card on its payroll, and for each
48' pay period, which approximates twice a month, if the total earnings of the red caps as an employee

by passengers and others did not average the minimum requirement under the wages and hours act then our company guaranteed and made up the difference until each received the minimum.

Q. During the whole period of time, that is from the effective date of the act up to July 1, 1940, these men were engaged in the same class of work they had been doing for the company for the prior ten or more or years?

A. Generally speaking, yes.

Q. Would the same question apply to July 1, 1940? To the date of the filing of this suit?

A. No, not exactly, because on July 1, 1940, we changed the practice of putting each red cap on the payroll at the minimum requirement of the Wages and Hours Act, which at that time was thirty cents an hour for the numbers of hours which he worked a day. We then required

him to put checks on the individual pieces of baggage, luggage and so forth which he handled, but the red caps turned those funds into the company. That is to say, accounted for them. The rate for this service was ten cents per parcel or bag or piece.

Q. Then, we can assume that the only additional requirement or work or labor that these plaintiffs were performing subsequent to July 1, 1940, over any previous employment was the attaching of tags to the various articles of luggage carried or used by the passenger, and collecting from the passenger the sum of ten cents for each parcel of luggage carried or handled?

A. That is correct.

Q. They were performing the same kind of work in general that red caps had engaged in for years with this same company, with this slight addition?

A. Yes. Of course, subsequent to August 9, 49 we entered into a supplemental agreement which we called the bonus system. Under that system we turned over to the red caps nine cents and retained one cent and still guarantee that they will receive the minimum under that set up.

Q. And they are still doing the same class of work under that set up?

A. That is correct.

Q. Under the system used from the effective date of the act up to July 1st, 1940, did the red caps turn over to you any money, any funds?

A. No, they kept all the money received.

Q. All the money they received from the passengers from whom they were engaged in assisting as red caps, was retained by them and not turned over to you or your company, that is, up to July 1, 1940?

A. That is correct.

Q. The effective date of this accounting and guarantee system was under this notice that has been filed in evidence October 24, 1938?

A. Yes.

Q. That manner of compensation was in existence August 17, 1939; was it not, that being the date of a settlement made by your company with the men?

A. Yes.

Q. I hand you a carbon copy or typewritten paper identified as receipt for back wages due under the Fair Labor Standards Act and ask you whether or not you remember anything concerning certain receipts that might have been signed by any of the employees at or about the date of August 17, 1939?

A. The receipt which is mentioned in this
50 question is a receipt which was originated by representatives of the Wages and Hour Department at Washington, who after checking our records sometime subsequent to August 15, 1939, decided to get a receipt from each individual red cap, to ascertain whether or not he had received the money which our payrolls indicated we had paid him in back pay. The Jacksonville Terminal Company did not get these receipts or ask for them from the red caps. It was an economic suggestion to check up on our payments to the red caps.

Q. You do remember this form of the receipts?

A. I saw some of them afterwards. I did not until afterwards.

Mr. L'Engle:

I would like to mark this for identification as Exhibit A.

The paper was marked "A", for identification for the Plaintiffs.

Q. Had there been any settlement or any sums of money that might or might not have been due the red caps under this accounting and guarantee system prior to the time of the dates mentioned in this receipt that has

been offered for identification? Or in other words, is this the first settlement that was made by the Company to the red caps?

A. That is the only settlement that was made so far as I now recall, and that began back in July, well back in July.

Q. Negotiations for such settlement?

A. No, the settlement was voluntary on the part of the Terminal Company, because the question has been raised with reference to the way in which we kept the hours that had been worked by these red caps. In that, each red

cap had a separate time card upon which he wrote
51 down the time consumed in each job, and that was effective October 24, 1938. At the end of the day,

we totalled up the time which the red caps said he had worked and figured his minimum earnings of so much an hour or for what he said he had received for his services from passengers. Later on we felt that that method of keeping the time probably was not equitable and that we should take into consideration the time that the men were hanging around the station between jobs waiting for work, also as the proper medium for the rate per hour.

Q. Do you remember when you arrived at that conclusion?

A. I would say it was somewhere around July 1st, 1939, because it was a tremendous undertaking to go back and work up all those cards and get the back pay that was due them under this new set up. Then, we also had a settlement with the men through this Frank Leggett as to what the assigned hours with which the base of pay from the hours actually worked to the assigned hours; the assigned hours were longer than the actual working hours.

Q. But still under the accounting and guarantee system?

A. Oh, yes.

Q. Do you remember or can you remember or have you any records with which to refresh your recollection as to what time you arrived at the question in your mind as to whether the first arrangement was equitable and should be changed. When the first arrangement was inequitable and should be changed?

A. That refers to the arrangement of working hours?

Q. Yes. In hours hanging around the station.

A. As a matter of fact, over a period of six or eight months the matter was under consideration. There was a difference of opinion as to the method.

52 Q. Can you tell us what time you actually started the investigation of your records to make a determination as to the actual settlement that should be made to these men? I might suggest for your consideration the statement you have just made about Frank Leggett making some negotiations or working with you in ascertaining the number of assigned hours, if you understand what I am trying to arrive at.

A. I would say the actual work and negotiations with Frank Leggett must have been somewhere around the latter part of July. My recollection is it took two or three weeks to work the whole thing up.

Q. Would we be safe in assuming that that work started sometime after July, 1939?

A. Yes, sir.

Q. Mr. Wilkes, in one of the exhibits, the letter dated November 30, 1938, there is a reference in that letter of an agreement supposed to have been attached to that letter. I hand you for your examination the form of agreement and ask if you can you state whether or not such an agreement was attached to that letter? I call your attention to the fact that exclusive of the change in numbers of paragraphs the agreement handed you now is identical to the agreement in evidence as being the agreement effective as of June 16, 1939, the difference between the two being paragraph nine in each of the instances.

Mr. Hartridge:

Do you mean to hand him the letter of July too?

Mr. L'Engle:

No, not the letter, but just the agreement.

A. That is generally correct. I previously testified in regard to the November 30 letter that there was a memorandum of the proposed agreement of the eight items attached thereto in regard to the general pay of the red caps, proposed pay of the red caps. With the exception of rule nine, the proposed agreement attached to the letter of November 30, which you have just referred to, was reached in general compromise in an agreement effective June 16, 1939. The eight items mentioned above in the memorandum were never agreed to. The form of the agreement submitted for my examination may have been attached to the letter of that date when it was sent to me. I think probably it was.

Mr. L'Engle:

Now, the plaintiffs offer the exhibit just identified by Mr. Wilkes in the preceding question as Exhibit No. 32.

Said exhibit referred to was received and filed in evidence and marked as Plaintiffs' Exhibit No. 32.

Thereupon the hearing was recessed to be resumed at ten o'clock a. m. the following day, Tuesday, October 8, 1940.

Pursuant to adjournment the further taking of depositions in this cause was resumed at 10:20 o'clock a. m. Tuesday, October 8, 1940; the same parties were present as attended the last preceding hearing and the following further proceedings were had:

JOHN L. WILKES, the witness, being recalled further testified on behalf of the plaintiff as follows:

Direct Examination.

By Mr. L'Engle:

Q. Mr. Wilkes, do you know whether or not your company ever paid any tax under the terms of the Railroad Retirement Act, of 2 3/4% and 3% to January 1, 1940, and 3% subsequent to that time, on the amounts of money reported by the red caps as being received from the passengers?

A. No.

Q. Will you please tell us whether or not your company ever paid any tax on the other employees under this Railroad Retirement Act, the same class of taxes and percentages?

A. Yes.

Q. May I interpret that answer to mean that your company paid the percentage mentioned in the other question of 2 3/4% and 3% on the amount of money actually paid the red caps by your company?

A. Yes.

Mr. L'Engle:

That is all.

Mr. Hartridge:

I have no questions.

(Witness excused.)

55 L. L. WOOTEN, a witness upon behalf of the plaintiff, having been first duly sworn, deposes and says:

Direct Examination.

By Mr. L'Engle:

Q. State your name and residence, Mr. Wooten.

A. L. L. Wooten, Wilmington, North Carolina.

Q. What is your present occupation, sir?

A. General Chairman, representing the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, on the Atlantic Coast Line Railroad; the Jacksonville Terminal Company; the Albany Passenger Terminal Company, the Savannah Union Station, and the Charleston Union Station.

Q. I understand this organization to be a union of employees of the railroads working under the Atlantic Coast Line Railroad Company?

A. It is an international organization, composed of employees in the clerical and station and storeroom classes.

Q. Does that organization have the authority, or were they appointed by the red caps, or the plaintiffs in this case, the red caps employed by the Jacksonville Terminal Company, to negotiate contracts and wage agreements for them with the Jacksonville Terminal Company?

A. It was.

Q. At or about what time?

A. About November 3rd, was when the official
56 authorizations were turned over to me.

Q. What year?

A. 1938.

Q. There have been turned over to the Examiner several letters addressed to you, L. L. Wooten, General Chairman, from J. L. Wilkes, President and General Manager; and from L. L. Wooten, General Chairman, to J. L. Wilkes, President and General Manager, which let-

ters I am exhibiting to you. I ask you are you the same L. L. Wooten mentioned in that correspondence (handing papers to the witness)?

A. I am, and these letters from me to Mr. Wilkes bear my signatures.

Q. On or about the 24th or 25th of October, 1938, there was a notice posted upon the bulletin board of the Jacksonville Terminal Company, setting out a plan of payment by the Terminal Company to the red caps, and which has been identified as the Accounting and Guarantee System. When is the first time that you had personal knowledge of such notice posted by the Terminal Company?

A. I believe there was something mentioned, and I might have seen that notice on November 4, 1938.

Q. Now, from that day to and including the first day of July, 1940, did you correspond and negotiate in your representative capacity for the red caps with the Jacksonville Terminal Company with reference to any working agreements or wage agreement between this employer and these employees; that is, the Terminal Company and the red caps?

A. Yes, sir.

57 Q. During that period of time, was there any agreement entered into by the red caps with the Terminal Company whereby the red caps agreed to accept this system of pay outlined as identified by that last question?

A. No, sir.

Q. Please tell us whether or not there were any negotiations made by you during that period of time in reference to the amounts of money that should be paid the red caps under the Fair Labor Standards Act.

A. Yes. There negotiations started at a conference with Mr. Wilkes on Friday, November 4, 1938; and continued, so far as I am concerned, until an agreement was made with Mr. Wilkes on August 7, 1940, and written up

by me a few days later, to become effective August 1, 1940.

Q. Now, prior to that time, was there any agreement entered into by you, representing the red caps, and Mr. Wilkes along in June, 1939?

A. There was an agreement entered into pertaining to working conditions. However, because of certain things existing at that time, we struck out a proposed rule covering the wages.

Q. Now, that agreement of June 16, 1939, was that any different from any proposed agreement that you had suggested to Mr. Wilkes, representing the Terminal Company, during the later part of November, 1938?

A. Yes, sir. It struck out a rule pertaining to wages.

Q. Then, I understand the first proposed contract submitted by you was to Mr. Wilkes in November, 1938, which contained a clause concerning the payment of wages under the Fair Labor Standards Act, that agreement being in evidence as Exhibit No. 32; which I now hand to you for examination and ask you to refer to paragraph 9? (Handing paper to the witness).

A. Yes. This paragraph 9 was submitted very shortly after our conference in November, and I think about the last of November, and it was under consideration from then until the date of the conference, which was in June, 1939, at which time we agreed on the other rule submitted, except that rule pertaining rates of pay.

Q. And what paragraph is that just mentioned?

A. Carried as rule No. 9 in the proposed submitted agreement.

Q. There was some other slight change?

A. Some slight changes.

Q. Can you tell us what they were? I mean in a general way, without going into detail about them.

A. I think that in the original proposal, there was a question about furnishing uniforms, etc., which later we took out of the final signed agreement.

Q. But the fundamental difference was paragraph 9, in both instruments?

A. Yes, sir.

Q. That is, the instruments submitted in the latter part of November, 1938 and the agreement actually signed, to be effective as of June 16, 1939?

A. Yes, sir.

Q. After this agreement was signed, did you have any understanding, or was there any agreement between you and Mr. Wilkes, representing the Terminal Company, as to what would then happen in regard to the payment of wages under the Fair Labor Standards Act?

A. May I answer that question by stating that at the time the working hours agreement was signed, we had written up the proposed agreement submitted in November, 1938; and submitted that to the Board of

59 Mediation, which carried the wage clause. When

I met Mr. Wilkes in June, 1939, I told him, and I believe I said so in a letter to him just prior to that date, that we would withdraw the case from mediation and sign the working agreement, and wait on the decision or order of the Federal Wage and Hour Administrator as to the question of wages, as there had been ~~at~~ a hearing in Washington on this entire question of whether or not tips could be accounted, as any part of wages.

Q. Did that hearing that you have just mentioned ever take place?

A. Yes, sir.

Q. I hand you herewith a paper upon the first page of which is the certificate of one Gustav Peck, purporting to be a true copy of the findings and recommendations of the presiding officer, dated September 28, 1939, in the matter of a hearing under the Fair Labor Standards Act of 1938 in regard to Red Caps or hand baggage porters; and I ask you whether or not you are familiar with this order and the proceedings under which these recommendations were made? (Handing paper to the witness)?

A. Yes, sir.

Q. Are those the findings on the hearing that you just mentioned in your previous testimony?

A. Yes; a copy was furnished to me as the findings resulting from the hearing I have just mentioned.

Mr. L'Engle:

The plaintiffs offer in evidence the certificate and the mimeographed copy of the findings, consisting of 18 pages, and the page of the certificate. ✓

Mr. Hartridge:

The defendant objects to the introduction on the general ground that the document is incompetent, irrelevant, and immaterial; and reserves the right, which is provided by the rules of the Federal procedure, to object to the introduction of the document in evidence, and at that time to interpose more specific objections to its introduction.

60 Mr. L'Engle:

Mr. Hartridge, I understand the first word was, "incompetent". Do I understand that you object, or that that objection would be used as to the authenticity.

Mr. Hartridge:

There is no objection being made as to the document being a copy of what it purports to be.

Said certificate and the mimeographed copy of said findings being received and filed in evidence as Plaintiffs' Exhibit No. 33, and being hereunto attached.

Q. At or about the time that this agreement was entered into between you and Mr. Wilkes, was there any federal case pending, to your knowledge, involving this same question of the Fair Labor Standards Act applying to Red Caps, in reference to their compensation, and

whether or not a guarantee and accounting system was a proper manner in which to pay the Red Caps under the Fair Labor Standards Act?

A. There were some places in progress, or being prepared and awaiting the decision, or awaiting the order of the Administrator on this particular question.

Q. In your answers, Mr. Wooten, who do you mean to designate by "We"?

A. The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, or its duly accredited representatives.

Q. That applies to the petition that you had filed before the Mediation Board?

A. Yes, sir.

Q. Was there any other act or condition arising in the negotiations between you and Mr. Wilkes as of June 16th, the June 16th agreement, in regard to some decision to be made, other than the Administrator?

A. Not at that particular time. I think we both discussed the matter and both agreed that, regardless
61 of whatever the Administrator might do, the case might go to Court.

Q. After the Administrator made his ruling, of which we have introduced a copy, did you have any further conferences with Mr. Wilkes in reference to this matter, the wage and hour matter?

A. Yes, sir. We had a number of conversations; and during all of those conversations, I particularly stressed the Dallas, Texas case, which was identical as to set up and operation, as I understand. And there was also a case at Cincinnati, and I believe one at Cleveland; but I did not have the record on the Cincinnati and Cleveland cases, but I was keeping in close touch, and had the records on the Dallas, Texas case, which was being prepared at the time the hearings were held under the instructions of Mr. Andrews.

Q. What was the effect of the Dallas case to be upon the negotiations between you and Mr. Wilkes in regard to this paragraph 9 in the agreement of June 16, 1939?

A. It was my understanding that the Dallas case would decide the questions for us on the Terminal Company.

Q. May I ask you to explain who you mean by "us" in that answer?

A. The employees whom I represent.

Q. Was that the understanding between you and the employees, or did you have that same understanding with Mr. Wilkes as far as the Jacksonville Terminal Company was concerned?

A. Mr. Wilkes, in all of the conversations in connection with it, eventually stated that whatever was done by the Courts, that his company would have to do; and in those conversations, the Dallas, Texas case was always the one stressed.

Q. Now, what explanation can you give us for the reason of the lapse in time of the correspondence between you and Mr. Wilkes from June 16, 1939, when written negotiations ceased, until the early part of July, 1940?

A. On June 8th, 1939, I signed the agreement on working conditions with Mr. Wilkes, to be effective June 16, 1939. Between that date and July 1, 1940, I discussed the question of wages, and what was going to be done, with Mr. Wilkes on the following dates: August 5, 1939, which was on Saturday; September 7, 1939, which was on Thursday; December 16, 1939, which was on Saturday; January 27, 1940, which was on Saturday; May 2, 1940, which was on Thursday; June 15, 1940, which was on Saturday; and again on July 16, 1940; and which was in connection with the wages to be paid after July 1, 1940, and what was to be done about the back wage. And on July 16, 1940, I notified Mr. Wilkes in personal conversation that I had held off action in this case as long as it was possible on the back wages, because the Dallas, Texas case.

had been decided by the Courts, and we understood, and we understood—and when I refer to “we”, I mean the organization, myself representing these employees—that the Dallas, Texas decision would decide our case so far as back wages were concerned.

Q. Is that the reason that the question of wages was left out of the June 16, 1939 agreement, so that it could be put in the agreement in the event of a decision on the matter by the Administrator or by some judicial determination?

A. Yes, sir.

Q. There was not an agreement between you, representing these men, and him that the Guarantee and Accounting System should stand as the manner and amount of wages to be paid these employees?

A. No, sir.

Q. Or that the system in existence at the time, that is, subsequent to June 16, 1939 agreement up to July 1, 1940?

A. No, sir. We protested that system and contended that at all times, in letters and personal conferences, that tips had no place as being any part of the wage that the law specified the employer should pay to the employee. And in many of those instances, I cited Mr. Wilkes to the rulings under the N. R. A. with regard to Dining car help, Pullman Porters, Hotel help, and many others, that tips were no part of wages.

Q. Then, I may say that your understanding with Mr. Wilkes was that the matter of wages, was to be left out of the contract until a determination, either by the Administrator or some judicial proceedings?

A. That is correct; and that we would then negotiate or apply whatever that decision might be, because I felt, and I think he did, that that was beyond our control whenever the Court or the Administrator might decide that issue.

Mr. L'Engle:

That is all.

Cross Examination.

By Mr. Hartridge:

Q. Then there was no agreement reached between you, as chairman of the brotherhood which you have described, and Mr. Wilkes as president of the company, in regard to wages or validity of the Accounting and Guarantee System?

A. There was an agreement made with respect to wages.

Q. There was or was not?

A. There was an agreement made with respect to wages effective August 1, 1940, but no prior agreement..

Q. But there was no prior agreement?

A. In other words, we were in disagreement
64 and there was a dispute existing under the terms of the amended Railway Act.

Q. I hand you a printed copy of a pamphlet entitled, "Revised Agreement between the Jacksonville Terminal Company and employees herein named represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees. Effective February 1, 1937."; and I ask you if that agreement was in effect according to its terms (handing document to the witness)?

A. Yes, sir. And may I say further that the notice served on Mr. Wilkes, along with others, on October 25, 1938, stipulated that we would expect the terms of that working agreement applied to Red Caps until such time as exceptions might be made.

Q. There was no other agreement between the Terminal Company and yourself, as representing the brotherhood, between the period of this agreement and the agreement dated June 16, 1939, was there?

A. Yes, two agreements between those dates.

Q. What agreements were they?

A. Agreements on wages. That agreement does not carry any wage sale in it at all; that is a working agreement that you have just submitted; and between the date of that agreement and the date you have mentioned, July 1, 1940, there were two agreements between our organization and the Jacksonville Terminal Company pertaining to wages of employees covered by that agreement.

Q. Are those agreements among the agreements which have been identified and introduced here?

A. They are not.

Q. Did those agreements relate to Red Caps?

A. They did not.

Q. In any way?

65 A. They did not; but they did relate to the employees covered by that agreement at the time it was made.

Q. After the ruling in Ex Parte-72 was made, was it your contention as chairman of the brotherhood that this agreement effective February 1, 1937 applied to Red Caps?

A. Yes, sir. The date of Ex Parte 72, sub one was September 29, 1938. That Ex Parte was given to me, delivered to me, on October 24, 1938. The Red Caps employed by the Jacksonville Terminal Company had been negotiating with me for approximately two years to become organized and get an agreement or come within the scope of our agreement. The question of whether or not Red Caps were employees under the amended Railway Labor Act was before the Interstate Commerce Commission, and I notified these employees that it would be useless to become organized until the Commission had rendered their decision, but that as soon as that decision was rendered, if it was favorable, we would accept the employees into the organization and make contracts and handle their wages and working conditions as provided by the amended Railway Labor Act. I was in Cincinnati

when the decision or order of the Commission was delivered to me, the following day, and which happened to be the day the Fair Labor Standards Act became effective, and I was on the train between Cincinnati and Richmond, and I wrote a joint letter, which has been submitted; and it is our contention and has been that the agreement you have just presented covered the working conditions and hours of service of the Red Caps from October 25, 1938, until the date of the working agreement, leaving out wages, which was signed, effective June 16, 1939.

Mr. Hartridge:

I offer that pamphlet for identification.

Said pamphlet above referred to being received and filed as defendant's Identification Exhibit "A".

Q. Your letter, which has been identified in this record as Exhibit I-A, is dated October 25, 1938. Is that the letter to which you refer?

A.. Yes, sir.

Q. At all times, in your relations, you were
66 acting as chairman of the Brotherhood?

A. Yes.

Q. Mr. Woofen, you did not mean to testify that there was an agreement between you and Mr. Wilkes mutually, you representing the Brotherhood and he representing the Terminal Company, to accept, to put into effect, the findings which might be made by the United States District Court in the Dallas, did you?

A. Well, in answer to that, I found out later on that I had misunderstood, what I first did understand; and that is the reason I think that this case is here now; because it was my understanding, whether definitely stated or not, or an impression, that the Courts or the Administrator would decide the one and only question of whether tips were part of wages, and that the railroads, including the

Jacksonville Terminal Company, would accept that decision. Later on, after the Dallas case had been decided by lower Courts, there was some delay in appealing, the appellation of it, and I discussed this matter during that time. And Mr. Wilkes asked me if I knew whether it was going to be appealed or not. Later, at another conference, he told me it had been appealed. That is where I got my first information that it had been appealed. And I told him at that conference, when he told me that it had been appealed, that we could not wait two or three years for that case to be tried and to go to the Supreme Court, and lose the opportunity under the law of getting endemnity wage.

Q. But there was no assertion on your part that you had agreed that that would be accepted?

A. No, I wouldn't say that Mr. Wilkes had agreed.

Q. You knew that in the Findings and Recommendations, which have been submitted to you and identified, that one of the recommendations made by the presiding officer was: "1. That the Division take immediate steps through Court action to determine the validity of the accounting and guarantee arrangement under which many Red Caps are employed"?

67 A. Yes, I knew that.

Q. Therefore, you knew that the Department of Labor took the position that it did not have the authority to determine the validity of that accounting and guarantee system, but it was one which must be determined by the Courts?

A. Well, from my knowledge of the general actions upon the part of employers throughout the country, particularly the railroads, they were going to take the matter to Court, because they have not complied with the Fair Labor Standards Act.

Q. That Fair Labor Standards Act?

A. Yes; in a general way. But there have been many cases brought to enforce the provisions of that law for railroad employees.

Q. But you knew at the time you were negotiating or corresponding with Mr. Wilkes that the United States Department of Labor thought that it was a matter to be decided finally by the Courts?

A. During the latter part of 1939 and early 1940, yes.

Q. The Administrator of the Fair Labor Standards Act, or the Department of Labor, has never made any finding of its own, has it?

A. Not to my knowledge.

Mr. Hartridge:

That is all.

Re-Direct Examination.

By Mr. L'Engle:

Q. But it was your understanding with Mr. Wilkes that you and he could not decide this question, and that that would have to be determined by either Mr. Andrews or by some judicial proceeding?

68 A. During the early part of my negotiations, it is my belief that Mr. Wilkes made every effort possible with his Board of Directors to settle this action, and eventually was prevented by the action of his Board of Directors from settling it pending Court decision on this question. And at no time during the entire negotiation, starting at the conference of November 4, 1938 and up until the signing of the agreement on August 7, 1940, to be effective August 1, 1940, was there any agreement between Mr. Wilkes and myself as to the correct pay for the Red Caps from October 24, 1938, until August, 1940. Now, we accepted without protest the wage paid to the Red Caps for the month of July, 1940, which is not the exact wage contained in the agreement signed effective August, 1940.

Q. Back of July 1, 1940 to the effective date of the act, was there any agreement or understanding between you

and Mr. Wilkes that this accounting and guarantee system would be the amount that these men would receive under the Fair Labor Standards Act?

A. No, sir.

Q. In other words, the whole thing was under negotiation at all times, and no definite agreement was ever entered into as to the rate of pay of the men under this accounting and guarantee system until judicial determination of that wage question was made?

A. I have already stated that it was a dispute existing under the terms of the amended Railway Labor Act affecting the wages of these Red Caps.

Q. Then you never accepted this guarantee and the accounting system on behalf of the Red Caps at all?

A. No, sir.

Mr. L'Engle:

That is all.

Mr. Hartridge:

That is all.

(Witness excused.)

69 FRANK LEGGETT, a witness upon behalf of the plaintiff, having been first duly sworn, deposes and says:

Direct Examination.

By Mr. L'Engle:

Q. Your name and residence?,

A. Frank Leggett, 1617 Myrtle Avenue, Jacksonville, Florida.

Q. Where do you work, Frank?

A. Jacksonville Terminal Company.

Q. How long have you worked for them?

A. Twenty-one years.

Q. In what capacity?

A. For the last fifteen or sixteen years, I have been Captain of the Red Caps.

Q. Just explain what that position means, Captain.

A. Captain of the Red Caps sees that trains are properly met; assign wheel chairs and stretchers, and meet those trains on arrival; see that those people are taken care of; and to assign the Red Caps to different watches, and to meet the different trains that they are assigned to, and to see that they meet them.

Q. Prior to the 24th day of October, 1938, did the Jacksonville Terminal Company ever give you any money for any of the work that you did in or around the Terminal there as referred to, as Captain of the Red Caps?

A. No, sir.

Q. Where did you get any money for the services that you rendered?

A. All moneys that we received, or that I received personally, prior to the 24th of October, was received by tips from passengers that I waited on.

Q. What is a tip?

A. A tip is just, in otherwords, we assume it as a gift for services rendered.

Q. What did they give you?

A. A quarter, sometimes a dime, or a nickel. I have ~~gotten as high as~~ ten dollars, during the boom. People had plenty of money then and were liberal with it; like when they had those touring parties that they sent out here, when they were building up those different places in the southern part of the state, like Hollywood and those places, where we handled fifty or a hundred people on floats, that I would get as high as ten dollars and up on them.

Q. Prior to July 1, 1940, did you ever turn over to the Terminal Company any of the money you received from the passengers? .

A. - No, sir.

Q. Or any of your tips?

A. No, sir.

Q. Prior to October 23, 1938, did you ever make any accounting to the railroad company of any of the money received by you from the passengers?

A. No, sir.

Q. Prior to October 23, 1938, did the Jacksonville Terminal Company ever pay you any money at all for any work that you did down there in the position that you have just testified, that is, either as Red Cap or Captain of the Red Caps?

A. No, sir.

Q. What are the duties of a Red Cap or the Red Caps, in their work at the Jacksonville Terminal Company, in two parts; that is, prior to October, 1938 and subsequent thereto?

A. The duties of the Red Caps, their duty is to receive the assignments; and those assignments of course, consist of assisting passengers in and around the station, to taxi cabs and to meet the trains. Some of the assignments require them to be referred to stations at those Pullman cars that come in here in the morning; and that assignment covers the duration of the occupancy of those passengers on the car, and they are supposed to remain there until the last passenger gets off, and to assist the passengers that they are referred to ~~to~~ be available for waiting on them.

Q. Is there any distinction made between the services rendered by the Red Caps to the white passengers and the services rendered by the Red Caps to the colored passengers?

A. There is no difference, no, sir. There is an assignment of Red Caps to the white passengers and there is an

assignment of Red Caps to the colored coaches on the trains. The Red Caps are assigned to the white coaches and to the colored coaches; and those Red Caps are assigned to the Pullmans on all the trains that come in.

Q. Is there any difference in the manner in which he gets any money for the work at the Terminal Company from the white passengers and the colored passengers?

A. Well, the colored passengers are not as liberal as the white. But then, you can, naturally, get a whole lot more of them; and, in a lot of instances, you get more out of them because of bulk.

Q. But still if a colored passenger pays you money, you take it just the same?

A. They all pay you when they have it. If they don't have it, they will tell you they don't and you don't get anything out of that job.

72 Q. The Terminal Company does not pay you any money, then, for services rendered to the colored passengers as well as the white passengers?

A. They didn't pay us at that time, nothing for nobody.

Q. Now, since July 1, 1940, what has been the pay the Terminal Company has made to the Red Caps?

A. On July 1st, they substituted what is known as the dime a parcel system. Then, they notified us that we would be put on the minimum rate, which was thirty cents an hour, two dollars and forty cents for an eight hour job. And, of course, there is a little differential there in my case; and I get a little more than that, because at that time I was getting around \$2.65 a day and now my pay is \$3.20 effective as of August 1st, when it went in.

Q. You are still holding this Captain's job?

A. I am still holding the job that I had before.

Q. But the rest of the Red Caps get the same thing?

A. \$2.40 for eight hours.

Q. Is there any difference in the work that the Red Caps are doing subsequent to July 1, 1940 from the work they were doing prior to that time?

A. There is no difference in the work; but, there is a little difference in the assignments, but there is no difference in the work.

Q. Who is required to collect the money for the checks that are used now by the Terminal Company in the Red Cap work?

A. The Red Cap is given thirty checks, of course, he is charged up with thirty checks. When he gets rid of those checks, if he gets rid of them before his eight hours is up, he goes back to the office—they have a place provided there for him—and he gets as many checks more
73 as he thinks he will need. And when he gets ready to report off duty, he reports back to the place that he got those checks and reports in ten cents for every check that he is short or every check that he has used.

Q. Now, does the Red Cap put those checks on the passenger's articles of baggage?

A. Those checks are attached to every article of hand baggage or luggage that the Red Cap handles; and, of course, the passengers are charged ten cents for every article or piece of hand baggage that the Red Cap handles.

Q. Who collects the ten cents?

A. The Red Cap collects it.

Q. And what do the Red Caps do with that ten cents?

A. They turn it in to the clerk that they have there.

Q. That system has only been in existence since July 1, 1940?

A. July 1, 1940.

Q. Prior to that time, there were no checks and there was no payment by the Red Cap of any money he received from the passengers?

A. No, sir. You were required prior to that time to report on a card the amount of your tips, the time that you consumed, and that card was turned in; but, of course, you were allowed to keep the money. And at the end of the fifteen day period, which they use down there to

compute your time, if there was any difference between the amount that you earned for the number of hours you worked, and the amount you reported in as tips, which they called the Accounting and Guarantee System, that difference was given to you by check on pay day; but if there was no difference, you didn't get no check.

74 Q. You were here yesterday and today when Mr. Wooten was talking. Is this the Mr. Wooten that was appointed by your organization to represent you in the negotiation with the Terminal Company under your wage and working agreement?

A. Yes, sir.

Q. Does anyone else have any authority to make any such negotiations?

A. No, sir.

Q. Now, who gave you instructions as to meeting trains, if any, in the event that sick or disabled persons were on the trains to be moved?

A. Those wheel chair orders were wired in by the conductor on the trains; and some of them were addressed to Mr. John L. Wilkes, president and general manager, and some of them were addressed to the Station Master; but they came out of the Station Master's office. His clerk got the report of them and turned over to me and I got the pick up order for the wheel chairs and stretchers coming in on all trains arriving here in the morning; and I bring them in as the men come in to report for duty and I take those men and assign them to meet those trains with those wheel chairs and stretchers.

Q. Prior to July 1, 1940, did the Terminal Company pay you any money for that work?

A. No, sir. The only money we got out of anybody, prior to the time that they put on that \$2.40 a day, was what we got out of the passengers.

Q. And that money was paid by the passenger direct to you?

A. Direct to me.

Q. Was there any set scale or set amount to be paid by the passengers for that handling?

A. No, sir; just whatever the passenger's financial condition allowed him to pay, that is all he pays.

75 Some of them didn't even do that well.

Q. When you were working for some of the employers of the Terminal Company, like Mr. Wilkes or some of the higher officials, were you paid by the Terminal Company for handling that?

A. No, sir. As a general rule, Mr. Wilkes always gave you something when you waited on him, and most of the officials, when you waited on them, they gave you a tip just like the rest of the passengers.

Q. But there was no difference between the tips that they gave you when you were working for them and what you did for all passengers except maybe in the amounts?

A. There was a difference between what you done for them and some of the passengers because, of course, I didn't expect an awful lot out of them, to start with. We can't afford to complain when the boss gives you something, you know.

Q. During the last several years, since 1930, 1931 or 1932, had the tips that you Red Caps received been as great or as much as in the prior years?

A. Well, up to 1929, when the stock market went to pieces up there, a Red-Cap job was a pretty good job. The amount that you made was determined by the effort that you put in trying to make it, because there was always plenty of work there. During the depression, or beginning with '29, the type of people that were handled in the winter, the rich ones, the people from the north, they didn't have the money, and in Florida they didn't make any, wasn't anybody down here. So, naturally we didn't make the money, because we were only handling a poor class of people and the tips became smaller. The railroads were forced to curtail the trains that they had and the schedules were cut down, and it was just a case where we

had to reduce forces, and those that we did keep there were making probably a couple of dollars a day, sometimes a dollar, and I have known days down there when they didn't make but about seventy-five or eighty 76 cents, in the summer time. Nobody had money to pay and they didn't have any, and nobody wanted to travel.

Q. And those that were traveling weren't tipping?

A. They were more careful with their money and of course they didn't give you as liberal a tip as they used to.

Q. These tips were paid by the passengers to you direct?

A. Direct to the Red Caps.

Q. No accounting was made of the tips you received prior to October 24, 1938?

A. No accounting prior to October 24, 1938.

Q. And at no time prior to July 1, 1940, did you ever turn over any money received by you to the company—from the passengers, I mean?

A. No, sir.

Q. And when you handled a wheel chair out of a train into the Terminal Building, the person in the wheel chair could give you a tip if he felt like it and if he didn't he didn't have to?

A. Yes, sir. There was no charge. We were instructed not to place any charge on any passenger for any service that we might render to the passenger. If they wanted to give you anything, it was all right; but you were not permitted by the company to charge them anything. I have known instances where we have given men as high as high as eight or ten days in the street, and where the passenger complained that the Red Cap charged them for waiting on him. That was prior to the first of July, this year.

Mr. L'Engle:

That is all.

Mr. Hartridge:
No questions.

(Witness excused.)

STIPULATION.

It is stipulated and agreed by and between counsel that the signatures of the witnesses to their depositions hereinabove set forth be and the same are waived.

78 NOTICE TO TAKE DEPOSITIONS UPON ORAL EXAMINATION.

To: Julian Hartridge, Esq., Attorney for Defendant,
Jacksonville Terminal Company,
304 Bisbee Building, Jacksonville, Florida.

Please take notice that at 3:00 o'clock P. M., on the 7th, day of October, A. D. 1940, in Room 703 Bisbee Building, Jacksonville, Florida, the plaintiffs in the above entitled cause will take the depositions of L. L. Wooten, General Chairman, Brotherhood of Railway and Steamship Clerks, whose address is the Acme Building, Wilmington, North Carolins, and John Love Wilkes, President of the defendant corporation, whose residence is 512 Lancaster Terrace, and whose office is 1000 West Bay Street, Jacksonville, Florida, upon oral examination, pursuant to the Federal Rules of Civil Procedure, before Raleigh C. Dowling, Notary Public, or before some other officer authorized by law to take depositions. The oral examination will con-

tinue from day to day until completed. You are invited to attend and cross-examine.

(S.) FRANK F. L'ENGLE,

(Frank F. L'Engle)

Attorney for Plaintiffs, C. L.
Williams, Individually, et
al.

525 Barnett National Bank Building,
Jacksonville, Florida.

Received a copy of the foregoing Notice this 28 day of
September, A. D. 1940.

(S.) JULIAN HARTRIDGE,

(Julian Hartridge)

Attorney for Defendant.
Jacksonville Terminal
Company.

304 Bisbee Building,
Jacksonville, Florida.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 1A.

RALEIGH C. DOWLING,

Notary Public.

79

Wilmington, N. C. Oct. 25th, 1938

Mr. C. G. Sibley,
Asst. General Manager,
Wilmington, N. C.

Mr. J. L. Wilkes,
Pres.-General Manager,
Jacksonville, Florida.

Mr. O. H. Page,
Chairman-Board of Control,
Savannah, Georgia.

Mr. O. T. Waring,
Chairman-Board of Control,
Charleston, S. C.

Dear Sirs:

The Interstate Commerce Commission under date of Sept. 29th, 1938; Ex parte No. 72 (Sub-No. 1) decided that employees commonly designated as "Red Capps" were employees under the terms of the Railway Labor Act.

As they are employed in and around stations, it is our contention that they come within the scope of our agreements, and are therefore covered by Group 3 of rule one of our agreement, and that we now have jurisdiction over such employees.

As they are covered by the scope rule of our agreement, all other rules covering group 3 are applicable, until such time as exceptions might be made to any of the rules.

Will you please advise your position in this matter.

Yours very truly,

General Chairman.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 1.

RALEIGH C. DOWLING,
Notary Public.

80

Wilmington, N. C. Nov. 14th, 1938.

Mr. J. L. Wilkes,
Pres. General Manager,
Jacksonville Terminal Co.,
Jacksonville, Fla.

Dear Sir:

Referring to our conference on the 4th. relative to contract for Red Caps.

We would like to get this closed up as soon as possible and I was wondering if you could meet me about the 21st. or very soon thereafter and draw and sign a contract covering them as you did not seem to be willing to agree that our present contract should cover them.

Will you please advise me when you can go into this again with a view of drawing the rules along the general lines outlined to you on Nov. 4th.

Yours very truly,

(S.) L. L. WOOTEN,
General Chairman.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 2.

RALEIGH C. DOWLING,
Notary Public.

Wilmington, N. C. Nov. 16, 1938.

Mr. J. L. Wilkes,
President-General Manager,
Jacksonville, Florida.

Dear Sir:

I have yours of the 15th your file T-15-1 in reply to mine of the 14th with regard to conference date on that matter of reaching an agreement and making a contract covering wages and working conditions for the Red Caps.

Just as soon as you have heard from your Executive Committee and received sufficient information on this question for you to go into it and make a contract I would appreciate your advising me as we would like to get it closed up as soon as possible and especially before the increase in winter time traffic and train service as many

81 of these men are complaining that they are not being worked while younger men are being worked and as I advised you on October 25 that we considered these men come within the scope of our existing agreement until such time as a separate agreement might be made therefore, we will have the question of settling the hours and wages under the existing agreement until such time as you are ready to make a separate agreement which I advised you we were willing to make at the time of our conference on November 4.

I can meet you on this question at almost any date if you can give me three or four days notice.

Yours very truly,
(Signed) L. L. WOOTEN,
General Chairman.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 3.

RALEIGH C. DOWLING,
Notary Public.

Wilmington, N. C. Nov. 26, 1938.

Mr. J. L. Wilkes,
President-General Manager,
Jacksonville Terminal Co.,
Jacksonville, Fla.

Dear Sir:

We have advised you that we will expect the terms of our existing agreement to apply to Red Caps until such time as changes might be made.

I am advised that the Red Caps are not being worked in accordance with their seniority; that junior men are being worked while senior men are not allowed to work.

You stated in your letter of the 16th that Red Caps were averaging \$3:00 per day, and if this is correct then it seems to us that the senior men who are being held out of service are entitled to \$3.00 for every day worked by a junior man.

Will you please check into this at once and have these men worked in accordance with their seniority, for unless this is done at once I will be forced to file claim for the senior men.

Yours very truly,

(Signed) L. L. WOOTEN,
General Chairman.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 4.

RALEIGH C. DOWLING,
Notary Public.

82

November 30, 1938.

Mr. J. L. Wilkes,
President General Mahager,
Jacksonville, Fla.

Dear Sir:

We are attaching you one copy of proposed contract covering Red Caps.

As this matter has been under advisement for the past 30 days, we would thank you to set date for conference to discuss and if possible agree on the rules as outlined in the attached proposed agreement.

We have given every phase of this matter due consideration and feel that we have gone about as far as we can in the proposed rules and they are in line with the memorandum given you on Nov. 4th.

An early date for conference would be appreciated.

Yours very truly,
(Signed) J. L. E. WOOTEN,
General Chairman.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 4.

RALEIGH C. DOWLING,
Notary Public.

1. Scoop of proposed Agreement to cover all employees in red cap service only.

2. Seniority roster of the red caps to be established, and first roster to be open for protest for a period of sixty days, and annual roster maintained thereafter.

3. Red caps to be allowed to use trucks.

4. Red caps to be counted as employees for the purpose of free transportation.

5. Red caps to carry out the duties of red caps only, and any of the other station forces not to be allowed to red cap on the days or dates they might work as other station forces.

6. In increasing and reducing forces, the seniority of red caps to be recognized.

7. Twenty-five cents per hour to be paid as a minimum on any day for four hours service, which can be spread in a period of not more than nine hours, or date within a twenty-four hour period, and red caps to be allowed such tips as they might secure during the entire time in and around station.

83 8. Captains to be paid at twenty-five cents per hour, and worked for six hours with pay during any twenty-four period, and allowed each day three hours without direct compensation.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 5.

RALEIGH C. DOWLING,
Notary Public.

Dec. 7, 1938.

Mr. J. L. Wilkes,
President General Manager,
Jacksonville Terminal Co.,
Jacksonville, Fla.

Dear Sir:

With reference to our many letters since October 24, with regards to Red Caps.

I am willing to hold the matter of making contract for them in abeyance owing to the Christmas rush, until after Christmas providing they are worked according to seniority and Mr. Greer will recognize seniority of these men, and does not put on so many over the week ends that none of them can make anything.

This is not being done, older men are off while younger ones are working, men have been told that they are knocked off and that they have no contract or seniority rights, and if that is the attitude of the Jacksonville Terminal Company, we will be forced to make claim for the senior men who are not worked while junior men are being worked, and take the matter of the present agreement covering these men to the Board as we feel that the present agreement does not cover them until such time as some other agreement may be reached.

On Oct. 15th Mr. Greer demanded that Edwin A. Thomas furnished a health certificate which was furnished on the 17th and he worked until the 28th and was knocked off, without any reason other than the baseball club would be worked as Red Caps, and junior men have been worked almost continuously since that time.

If we are to hold the contract matters in abeyance, such injustices must be rectified, for while we want to be reasonable we feel that the present agreement applies until such time as you may be willing to consider and agree on the proposals made to you some days ago.

Will you please check into this and advise me just what we may expect.

Yours very truly,
(Signed) L. L. WOOTEN,
General Chairman.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 6.

RALEIGH C. DOWLING,
Notary Public.

84

Jan. 13, 1939.

Mr. J. D. Wilkes,
Pres.-General Manager,
Jacksonville Terminal Co.,
Jacksonville, Fla.

Dear Sir:

With regards to our many exchanges of letters and conference this morning with regards to contract for Red Caps.

As stated to you, we feel that the contract which we proposed is more than fair to the Terminal Co. and if the Terminal Co. can and will agree to the provisions of the proposal, we are willing to stand back of it regardless of the instructions put out by Mr. Andrews; in accordance with the terms of the agreement, providing this can be done without undue delay.

However if the Terminal Co. can not and will not make an agreement covering these men, we will be forced to claim any penalty which the law provides for the vio-

lation of the wage and hours law, which I believe is all cost and double pay, and it is with a view of sincerely trying to help the Terminal Co. and the men involved that the proposal was made.

The terms of the proposal are very fair and it is our belief that when a ruling is issued on this question by the wage and hour administrator, it would be very much more expensive to comply with that ruling than to now agree to the proposed contract as of Oct. 24th, 1938.

We understand that you will let us know about this immediately after Feb. 10th, which is the date of the meeting of the Board of the Jacksonville Terminal Co.

We shall be expecting your advise as soon after Feb. 10th. as convenient.

Yours very truly,
General Chairman.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 7.

RALEIGH C. DOWLING,
Notary Public.

Feb. 3, 1939.

Mr. J. L. Wilkes,
President-General Manager,
Jacksonville, Fla.

Dear Sir:

Referring to our many letters and conferences regarding rules covering Red Caps.

At our last conference you advised me that your Board of Directors would meet on Friday Feb. 10 and that you would take this question up with them at that meeting.

I would, therefore, appreciate your wiring me collect on Saturday morning February 11 and advising me when you can give me date to go into the rules which we have already submitted to you.

I also want to advise that unless we can meet very soon after February 10 and negotiate rules covering this class of employees, we will be forced to appeal to the National Mediation Board on this matter as it has been under consideration since October 1938 and while we want to be reasonable, we cannot continue to hold it open as it now stands.

I would appreciate your placing this fact before your Board of Directors and will expect to hear from you by wire Saturday morning February 11.

Yours very truly,
(Signed) L. L. WOOTEN,
General Chairman.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 8.

RALEIGH C. DOWLING,
Notary Public.

Feb. 20, 1939.

Mr. J. L. Wilkes,
Pres. General Manager,
Jacksonville Terminal Co.,
Jacksonville, Fla.

Dear Sir:

Referring to your wire of the 10, and our many conferences and exchange of letters since Oct. 25th, 1938, with regards to contract for Red Caps.

I have given your wire much study, as it was somewhat of a disappointment to us, owing to the very fair offer we had made.

As we see this entire situation, the I. C. C. has ruled that these men are employees and under the terms of the Railway Labor Act, as amended.

One of the provisions of the Railway Labor Act is that there is a duty on carriers and organizations to make and maintain agreement on wages and working conditions.

You have, after proof was submitted; recognized our organizations as being the duly authorized organization to represent these men; and we have been very liberal in allowing time for some action on compliance with the law as to making agreements, but although almost four months has elapsed, we are no nearer an agreement that we were at the start.

We like to be law abiding citizens, and we also like to settle our differences on the property; but we do not feel that we can continue indefinitely to violate the law at least in spirit; and we feel that some action
86 should be taken without continued delay.

Will you please advise us as soon as convenient just what you are willing to do on this matter, as we must make some move on it very soon.

Yours very truly,

L. L. WOOTEN,

General Chairman.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 9.

RALEIGH C. DOWLING,

Notary Public,

March 5, 1939.

Mr. J. L. Wilkes,
President-General Manager,
Jacksonville Terminal Co.,
Jacksonville, Fla.

Dear Sir:

With reference to our many letters about contract for the Red Caps on the Terminal.

I expect to be in Jacksonville Wednesday the 8th and would like to see you about this about 10 A. M.

We must make some disposition of this matter, and if you are still unwilling to make any move on it, there is little left for us to do; except invoke the services of the National Mediation Board, but we had much rather settle it on the property if possible to do so.

Yours very truly,

(Signed) L. L. WOOTEN,
General Chairman.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 10.

RALEIGH C. DOWLING,
Notary Public.

87

Wilmington, N. C.,
March 20, 1939.

Mr. J. L. Wilkes,
President General Manager,
Jacksonville, Fla.

Please wire your decision regarding contract for Red Caps.

L. L. WOOTEN.

Send paid charge B. of R. C.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 11.

RALEIGH C. DOWLING,
Notary Public.

June 2d, 1939.

Mr. J. L. Wilkes,
Pres. General Manager,
Jacksonville Terminal Co.,
Jacksonville, Fla.

Dear Sir:

Will you please refer to my letter of May 26th. with regards to conference on June 8th.

Will you please wire me whether or not you can arrange to meet me on that date, on the subject matter contained in my letter of the 26th.

I would like to have reply as early Saturday as possible so I may arrange my schedule for next week.

Yours very truly,
L. L. WOOTEN,
General Chairman.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 11.

RALEIGH C. DOWLING,
Notary Public.

88

May 26, 1939.

Mr. J. L. Wilkes,
President-General Manager,
Jacksonville, Fla.

Dear Sir:

With reference to our correspondence regarding contract for Red Caps which case has been submitted to the National Board of Mediation.

I am wondering if you would be willing to meet and negotiate the proposed contract, we submitted leaving out the matter of payment of wages until such time as the wage and hours administration makes a ruling on this question.

If you would care to do this, we could negotiate all of the rules except the wage rules and enter into an agreement to apply whatever was finally ruled on by the wage and hour administrator with regard to payment of wages and then withdraw this case from Mediation as I believe from our letters and conferences we are pretty well agreed on all of the questions involved except that of wages.

Will you please advise me what you think on this matter and if you are agreeable to working out the agreement as outlined above, if you could meet me on this question on the morning of June 8th.

Yours very truly,

L. L. WOOTEN,

General Chairman.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 12.

RALEIGH C. DOWLING,

Notary Public.

89

Agreement Between the Jacksonville Terminal Company and Employees Herein Named, Represented by The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

Scope..

Rule 1.—These rules shall govern the hours of service and working conditions of all Red Caps, Red Cap Captains,

and all other employees handling hand baggage not already covered by agreement.

Seniority.

Rule 2.—Seniority of employees covered by this agreement begins when they are or were assigned to duty by the Company. Senior employees will be assigned to preferred watches and/or shifts upon request.

Seniority District.

Rule 3.—All employees covered by this agreement shall be in one seniority district.

Leave of Absence.

Rule 4.—Leave of absence may be granted employees when they can be spared without detriment to the operation of the property, and in case of physical disability or sickness indefinite leave of absence will be granted. If leave of absence extends beyond thirty days except in case of physical disability and sickness, the General Chairman will be advised and if the leave of absence extends beyond 60 days an agreement as to its extent will be reached between the Company and the representative of the employees.

Returning After Leave of Absence.

Rule 5.—An employee, returning after leave of absence, may exercise his seniority and displace any junior employee. Employees displaced by his return may exercise their seniority in the same manner.

Reducing Forces.

Rule 6.—When reducing forces, seniority rights shall govern. When forces are increased, employees shall be

returned to service in the order of their seniority, providing this is done within a period of twenty-four (24) month; otherwise seniority standing is forfeited. Employees desiring to avail themselves of this rule must file their address in duplicate with the stationmaster, or other officer in charge as designated by the Company, at the time they are cut off the extra board, advising promptly in duplicate of any change in address. Employees failing to file their address when cut off the extra board or failing to file any change in address or failing to return to the service within seven days after being notified by mail or telegram sent to the last address given or giving satisfactory reason for not doing so, will be considered out of the service. The officer will sign and return to the employee as his receipt one copy of the address as filed.

Extra Board.

Rule 7.—There shall be maintained an extra board and when employees are cut off regular assignment they may exercise their seniority over any junior employee on the extra board. Short vacancies in regular positions will be filled by assigning the senior extra men to the position until the regular occupant returns. The number of men necessary to maintain the extra board will be agreed to from time to time between the employees or their representative and the Company and only such employees as are necessary to properly protect the work will be carried on the extra board. Employees carried on the extra board will not be required to comply with Rule 6 but when cut off the extra Board they must file their address as outlined in Rule 6 within 10 days from the time they are notified that they are cut off the extra board.

Duties of Red Caps.

Rule 8.—Employees covered by these rules may be required to perform any and all duties of Red Caps, consisting of the handling of hand baggage for passengers, invalid rolling chairs, stretchers, and in other ways assisting passengers in and around the station and in and around trains while at the station; and they will be allowed to use hand trucks to perform this work but will not be required to do any janitor work or work covered by other agreements. The Company will have the right to assign the handling of rolling chairs, stretchers, and similar special work to any of the employees on duty.

Hours of Service.

Rule 9.—It is agreed that where service is intermittent, employees may be held on or for duty for nine hours in a calendar day within a 16-hour spread.

Rosters.

Rule 10.—Seniority rosters for all employees covered by these rules, showing name and proper dating, will be posted in agreed upon places accessible to all employees affected. The roster will be revised and posted in January and July of each year and will be open to protest for a period of sixty (60) days from date of posting. Upon presentation of proof of error by an employee or their representative, such error will be corrected. The duly accredited representative of the employees will be furnished with copy of all rosters.

It is understood that if the dating shown opposite any name goes over one protest period of sixty days (60) such dating will not thereafter be changed unless protest has been made and is under investigation at the

time the first sixty (60) days period in which protest can be made has expired.

Rule 11.—Employees whose regular positions are abolished may exercise seniority rights over junior employees on regular positions and/or on the extra board, providing this is done within a period of ten (10) days. Other employees affected may exercise their seniority in the same manner. Employees who do not desire to exercise their seniority may file their address as provided in Rule 6 at the expiration of ten (10) days and be subject to call when forces are increased as outlined in Rule 6.

Re-Entering the Service.

Rule 12.—Employees voluntarily leaving the service will, if they re-enter, be considered new employees.

Validating Records.

Rule 13.—The application of new employees will be approved or disapproved within sixty (60) days after the applicant begins work, unless a longer time is mutually agreed to by the Management and representative of the employees. In the event of applicant giving false information, this rule shall not apply.

91 Discipline and Grievance Investigation.

Rule 14.—An employee who has been in the service more than sixty (60) days or whose application has been formally approved shall not be disciplined or dismissed without investigation, at which investigation he may be represented by an employee of his choice or duly accredited representatives. He may, however, be held out of service, pending such investigation. He shall, upon

request, have not to exceed five (5) days advance notice of such investigation and be apprised in writing of the charges against him. The investigation shall be held within ten (10) days of the date when charged with the offense or held from service. A decision will be rendered within 10 days after the completion of investigation.

Hearing.

Rule 15.—An employe dissatisfied with the decision shall have a fair and impartial hearing before the next proper officer, provided written request is made to such officer and a copy furnished to the agent or officer whose decision is appealed, within seven (7) days of the date of the advice of the decision. Hearing shall be granted within seven (7) days thereafter, and decision rendered within seven (7) days of the completion of the hearing.

Appeal.

Rule 16.—If an appeal is taken from this hearing it must be filed with the next higher official and a copy furnished the official whose decision is appealed within ten (10) days after the date of the decision. The hearing of the appeal shall be held within ten (10) days and a decision rendered within five (5) days after completion of hearing.

Grievances.

Rule 17.—An employe who considers himself otherwise unjustly treated shall have the same right of hearing and appeal as provided above if written request is made to his immediate superior within seven (7) days of the cause for complaint.

Representation.

Rule 18.—At the hearing or on the appeal, the employe may be assisted by one or more duly accredited representatives.

.Right of Appeal.

Rule 19.—The right of appeal by employes or their representatives in the regular order of succession and in the manner prescribed, up to and inclusive of the highest official designated by the railroad to whom appeal may be made, is hereby established.

Advice of Course.

Rule 20.—An employe, on request, will be given a letter stating the cause of discipline. A copy of all statements made a matter of record at the investigation or on the appeal will be furnished on request to the employe or his representative.

Exoneration.

Rule 21.—If the final decision decrees that charges against the employe were not sustained, the record shall be cleared of the charge if suspended or dismissed, the employe shall be reinstated and paid for all time lost.

92

Date of Suspension.

Rule 22.—If an employe is suspended, the suspension shall date from the time he was taken out of the service.

Transportation.

Rule 23.—Committees of employes will be granted transportation when, possible to obtain, and necessary

leave of absence for investigation consideration, and adjustment of grievances.

Organized Membership.

Rule 24.—No discrimination will be made in the employment, retention, or conditions of employment of employees because of membership or non-membership in labor organizations.

Pending Decision.

Rule 25.—Prior to the assertion of grievances as herein provided, and while questions of grievances are pending, there will be neither a shut-down by the employer nor a suspension of work by the employees.

Attending Court.

Rule 26.—Employees taken away from their regular assigned duties at the request of the Management, to attend Court or to appear as witnesses for the Company, will be furnished transportation and will be allowed compensation equal to what would have been earned had such interruption not taken place and, in addition, necessary actual expenses while away from headquarters. Any fee or mileage accruing will be assigned to the Company.

General.

Posting Notices.

Rule 27.—Suitable bulletin board will be provided for posting notices of interest to employees covered by this schedule, and employees will be allowed to post notices of interest to themselves on this bulletin board.

Equipment Furnished.

Rule 28.—Hand trucks and badges required by the Company to perform the work covered in this agreement will be furnished by the Company without cost to the employees.

Free Transportation.

Rule 29.—Employees covered by this agreement and those dependent upon them for support will be given the same consideration in granting free transportation as is granted other employees in service.

General Committees representing employees covered by this agreement will be granted the same consideration as is granted general committees representing employees in other branches of the service.

Service Letters.

Rule 30.—Employees whose applications are approved and who have been in the service sixty (60) days or longer, will, upon request, if they leave the service of the Company, be furnished with service letter showing length of time in service, capacity in which employed and cause of leaving.

93

Effective Date.

Rule 31.—This agreement shall be effective June 16, 1939, and shall continue in effect until it is changed as provided herein or under the provisions of the Railway Labor Act as amended June 21, 1934.

Should either of the parties to this agreement desire to revise or modify these rules, 30 days written advance

notice, containing the proposed changes, shall be given and conferences shall be held immediately on the expiration of said notice unless another date is mutually agreed upon.

(S) J. L. WILKES,

President and General Manager,
Jacksonville Terminal
Company.

(S) L. L. WOOTEN,

General Chairman, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 13.

RALEIGH C. DOWLING,
Notary Public.

94

July 8, 1940.

Mr. J. L. Wilkes,

President-General Manager,
Jacksonville, Florida.

Dear Sir:

I have yours of the 2nd your file Z-23-C regarding physical handicaps of certain Red Caps.

I expect to be in Jacksonville on Tuesday the 16th and can meet you anytime Tuesday morning the 16th that is agreeable with you and will get in touch with your office to find out the time.

Yours very truly,

(Signed) L. L. WOOTEN,
General Chairman.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 14.

RALEIGH C. DOWLING,
Notary Public.

July 25, 1940.

Mr. J. L. Wilkes,
President-General Manager,
Jacksonville, Florida.

Dear Sir:

I have yours of the 24th your file T-15-1.

I note that you say it will take about three weeks to get a definite answer from your Executive Committee on the back pay of the Red Caps, therefore, you should be in position to give a definite answer to this back pay on or before August 7 and as soon as you are in position to give a definite answer, I would appreciate your advising me as I am being urged to enter suit as I explained to you in your conference on July 16.

I note what you have to say with regard to the recent wage agreements as to rates of pay of Red Caps and as advised you in conference on July 16, we shall expect what ever wage agreement that is reached between us to be applied as of July 1 and we will give consideration to the agreement signed with the New York Central and the Chicago Union Station Company and other agreements which may be signed during the next few days as I understand a number of conferences are now in progress on the question of wages of Red Caps and I hope you will be in position on or before August 7 to make us a definite proposition on the question of wages as we have made you a proposition on this question and we are open for any counter proposition you might desire to make but feel that the question of wages beginning with July 1, should be closed up as early as convenient.

Yours very truly,
(Signed) L. L. WOOTEN,
General Chairman.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 15.

RALEIGH C. DOWLING,
Notary Public.

95

August 2, 1940.

Mr. J. L. Wilkes,
President General Manager,
Jacksonville, Florida.

Dear Sir:

I have yours of the 1st your file T-15-1.

I will be at your office at 9 A. M. Wednesday August 7.

While in conference with you on July 16, I gave you copy of our proposal on wages for the Red Caps which was briefly that Red Caps would be paid the minimum set for the wage and hour law, that captains would be paid ten cents per hour addition and the end of each semi-monthly period the Company would add up the revenue received from Red Caps service and prorate the amount received above the wages paid to the Red Caps among these employes on the basis of hours worked.

We understood your letter of July 24 to be a tentative proposal on wages.

If we cannot agree on the wage effective July 1 along the above outlined it is our proposal to establish effective July 1, a rate of 36 cents per hour for all Red Caps with an additional \$25.00 per month for Red Cap Captains and where splits in service spread over twelve hours, several hours actual work with eight hours pay be established with time and one half for all time used of more than seven hours or in other words the same working conditions as exist in the baggage and mail department for excessive split tricks or intermittent service.

We would prefer the proposal presented on July 16 and if this is accepted we would be willing to let the present hours stand if there is no profit sharing agreement reached,

we feel that the men are entitled to additional pay or time off with pay where they are required to work split tricks over a long period of time.

We hope you will be able to discuss this matter on August 7, and get it in such shape that we can close it up very soon after August 7.

Yours very truly,
(Signed) L. L. WOOTEN,
General Chairman.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 16.

RALEIGH C. DOWLING,
Notary Public.

Wilmington, N. C.,
August 7, 1940.

Mr. J. L. Wilkes,
President General Manager,
Jacksonville Terminal Co.,
Jacksonville, Fla.

Dear Sir:

I am attaching you 7 signed copies of agreement on wages of Red Caps which I understood you would be willing to sign, and I would thank you to sign and return for my files four copies, if the agreement meets with your approval.

I am mailing this to you as I have a wire late this afternoon and do not know definitely whether I can fulfil my engagement at 4:30 P. M. Friday or not, so if you will kindly sign and mail to me, 4 copies of the agreement it will not be necessary for me to see you Friday as the men have advised me this agreement would be acceptable to them.

If for any reason this agreement as written up is not acceptable please wire me at the Bay View Hotel, Tampa, Florida. Thursday the 8th and I will try to see you some time during the day Friday the 9th so we may make any necessary changes, however, I think it is in accord with our discussion this morning except the last item or item 4 which I feel you will not object to.

Yours very truly,
(Signed) L. L. WOOTEN,
General Chairman.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 17.

RALEIGH C. DOWLING,
Notary Public.

August 17, 1940.

Mr. J. L. Wilkes,
President-General Manager,
Jacksonville, Florida.

Dear Sir:

I have yours of the 14th with regard to back pay for Red Caps.

What I told you was that these men were becoming very restless and that I had about exhausted my efforts so far as the back pay was concerned in holding them back from entering suit and that unless something was done very shortly after our conference on July 16th, I felt sure they would enter suit.

I am not advising a suit but I do feel that this matter has been in handling a sufficient time and that the law is plain and I cannot see why a suit under the wage and hour law should in any way effect our future relations and hope our future relations will not be effected by what ever these men decide to do about their pay.

I am entering suit or rather the wage and hour department is entering suit at my request at Savannah, Ga. as soon as the papers can be drawn up and the Administrator assigns the legal staff to the case.

Yours, very truly,
(Signed) L. L. WOOTEN,
General Chairman.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 18.

RALEIGH C. DOWLING,
Notary Public.

97

Jacksonville, Florida,
Oct. 24th, 1938.

To Red Cap
Jacksonville Terminal Company:

In view of the requirements of the Fair Labor Standards Act, effective October 24, 1938; and in consideration of your hereafter engaging in the handling of hand baggage and traveling effects of passengers or otherwise assisting them at or about stations or destinations, it will be necessary that you report daily to the undersigned the amounts received by you as tips or remuneration for such services.

The carrier hereby guarantees to each person continuing such service after October 24, 1938 compensation which, together with and including the sums of money received as above provided, which will not be less than the minimum wage provided by law.

You are privileged to retain subject to their being credited on such guarantee all such tips or remuneration received by you except such portion thereof as may

be required of you by the undersigned for taxes of any character imposed upon you by law and collectible by the undersigned.)

All the matters above referred to are subject to the right of the carrier to determine from time to time the number and identity of persons to be permitted to engage in said work and the hours to be devoted thereto, to establish rules and regulations relating to the manner, method and place of rendition of such service, and the accounting required.

**JACKSONVILLE TERMINAL
COMPANY.**

By J. L. WILKES,

President-General Manager.

I have read the foregoing, which is thoroughly understood by me.

.....
Red Cap.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 19.

RALEIGH C. DOWLING,
Notary Public.

98

Jacksonville Terminal Company.

Jacksonville, Fla.,
October 27, 1938.

T-15-1.

Mr. L. L. Wooten, General Chairman,
Brotherhood of Railway & Steamship Clerks,

Box 33,

Wilmington, North Carolina.

Dear Sir:

I acknowledge receipt of your letter of October 25, 1938, in regard to I. C. C. Ex Parte No. 72, decision of

September 29, 1938, regarding Red Caps, and your contention that they come within the scope of our existing agreement with the Brotherhood of Railway & Steamship Clerks:

It is my opinion that Paragraph (a) under the subject of Exceptions in our agreement exempts Red Cap service from the application of the rules of that agreement, as they are individuals performing personal service not a part of the duties of the company. Red Caps were not included or mentioned by name in the negotiation of our existing agreement, and in our recent conference subsequent to the decision of the I. C. C., Ex Parte 72, you stated to me that your organization did not represent the Red Caps. I think the wording of our agreement under Exception (a) is very clear, and must have had in mind such a type of employe as the Red Cap, who performs strictly personal service for the passengers which is not a part of the duty of the company. However, assuming that my views as above expressed should be held to be wrong, it still seems to me that in view of the fact that your organization has never represented Red Caps in the past, these Red Caps, now termed by the I. C. C. to be employes under the Railway Labor Act, should have a voice as to whom represents them; and until such a time as the entire matter is cleared up, we do not feel that representation arbitrarily seized or taken by your organization should be recognized. Possibly, some clarification of this may come in the near future, and I shall be glad to talk it over with you on your next trip into Jacksonville.

Yours very truly,

(S) J. L. WILKES,

President-General Manager.

JLW:W

CC: Mr. C. G. Sibley

Mr. O. H. Page

Mr. O. T. Waring

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 20.

RALEIGH C. DOWLING,
Notary Public.

Jacksonville Terminal Company.

99

Jacksonville, Fla.,
November 15, 1938.

T-15-1.

Mr. L. L. Wooten, General Chairman,
Brotherhood of Railway and Steamship Clerks,
Post Office Box Thirty-three,
Wilmington, North Carolina.

Dear Sir:

I have your letter of November 14, in further reference to the question of a contract for Red Caps.

There seems to be considerable confusion on this question. I have written to my Executive Committee in an effort to establish some policy in regard to it, and until I hear from them—and I have not as yet been favored with replies to my letter of the 4th to them—I will not know what we can do in regard to the matter.

I am advised that there is considerable confusion in regard to several of the questions brought up by you, such as, for instance, the question of tips being accredited, etc. Until I hear something definite, I can't very well set a date on the matter.

Yours very truly,
(Signed) J. L. WILKES,
President-General Manager.

JLW:W

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 21.

RALEIGH C. DOWLING,
Notary Public.

Jacksonville Terminal Company.

T-15-1.

Jacksonville, Fla.,
November 16, 1938.

Mr. L. L. Wooten, General Chairman,
Brotherhood of Railway and Steamship Clerks,
Post Office Box Thirty-three,
Wilmington, North Carolina.

Dear Mr. Wooten:

In further reference to my letter of November 15, in reply to yours of the 14th, in regard to the question of a contract for Red Caps.

I have been trying to check up on some of the statements made by you in our last conference. So far,
100 I have not been able to hear anything from the Cincinnati Union Station Company, where, I understood you to say, a contract had been entered into. The Washington Terminal Company has not yet entered into any contract, as I understand it, but are handling their Red Caps situation on pretty much the same lines as we are.

I understood you to say Mr. Andrews, or some of his representatives had made a ruling that tips were not to be considered as wages, but from the best information I can get at Washington, it would seem that this question has not yet been ruled upon by Mr. Andrews, and that his counsel has it under advice on similar questions which have been raised by other railroads and, possibly, the Association of American Railroads.

Until the matter crystallizes more and we have a better understanding of what we are to do, I do not think we should attempt to negotiate any contract, and unless we know the basic fundamentals as to wages and tips, it is going to be difficult to work out an equitable agreement. At the present time, our Red Caps are averaging around \$3 a day, and their actual time consumed in doing this work, not the spread, certainly wouldn't go over 3½ hours, or would not exceed that.

With kindest personal regards, I am

Yours very truly,

J. L. WILKES, (s)

JLW:W

President-General Manager.

Filed in evidence as PLAINTIFF'S EXHIBIT No. 22.

RALEIGH C. DOWLING,
Notary Public.

1939 Feb. 10 PM 58

QA90 Cak Jacksonville Flo 10.329P

L. L. Wooten, General Chairman, Brotherhood of Railway and Steamship Clerks Third Floor Labor Temple Acme Bldg. Wilmington NCar.

Your letter February Eighth: Information received yesterday indicates that practically no change has taken place in the Red Cap situation, and after full discussion to day, we feel that this situation at all larger terminal will have to be ironed out on a similar basis for all terminals, and that, in the absence of any definite information from Mr. Andrews, we are not in a position

to negotiate an agreement until we know more about what we are doing.

Personal regards.

J. L. WILKES.

Filed in evidence as PLAINTIFF'S EXHIBIT No. 23.

RALEIGH C. DOWLING,
Notary Public

101 Jacksonville Terminal Company,
Jacksonville, Florida.

February 21, 1939.

T-15-1.

Mr. L. L. Wooten, General Chairman,
Brotherhood of Railway and Steamship Clerks,
Box 33,
Wilmington, North Carolina.

Dear Sir:

I have your letter of February 20, acknowledging my wire of the 10th instant, which I sent you as agreed upon in our personal conversation, immediately after our Board meeting on that date.

I appreciate the situation of uncertainty which exists in regard to Red Caps. Up to the present time, there just simply seems not to be a scheme or plan suggested or agreed upon as a whole among any of the larger station operations as to the proper steps to take in this matter in the interest of both parties concerned.

The consensus of opinion seems to be that some definite, national policy should be worked out on this question which will embrace somewhat of a similar handling at

all of the larger station in given territories. For instance, New York, Philadelphia, Washington, Jacksonville, and Richmond should certainly be handled along the same general lines, and it seems to us that it is better to go slowly in the matter until we know what is the proper course to take rather than have one company attempt to make an agreement, then another a different kind of an agreement, and so on, with the result that we would have a dissimilar condition in all of these large operations. I am advised that we can get no definite information whatever on the question of wages and that there is a wide divergence of opinion among attorneys, both of the carriers and your own interests, as to many phases of the Wage-Hour Act; and many of them go so far as to say that it does not even apply. I am writing you freely about the matter because I do not want you to feel that we are showing any lack of respect whatever to your request, but, on the other hand, we are extremely anxious that whatever we do be the right thing.

Yours truly,

(S.) J. L. WILKES,

JLW:W

President-General Manager.

Filed in evidence as PLAINTIFF'S EXHIBIT No. 24.

RALEIGH C. DOWLING,
Notary Public.

Jacksonville, Fla., March 20, 1939.

Mr. L. L. Wooten, General Chairman,
Brotherhood of R. R. Clerks,
Wilmington, N. C.

Wire date—regret am unable to do any thing at present.
My people wish to see what ruling will be on tips before

we can agree to wage rates. Feel entire contract should
 hinge on that question. Will agree to contract
 102 as soon as that feature is cleared up. Think you
 should be willing to await that action.

J. L. WILKES.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 25.

RALEIGH C. DOWLING,
 Notary Public.

Jacksonville, Fla., June 3, 1939.

L. L. Wooten, General Chairman,
 Brotherhood of R. R. Clerks,
 Acme Bldg.,
 Wilmington, N. C.

Will see you as requested stop. Feel sure we can work
 out situation satisfactorily.

J. L. WILKES.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 26.

RALEIGH C. DOWLING,
 Notary Public.

Jacksonville, Fla., June 3, 1939.

L. L. Wooten,
 General Chairman of R. R. & Steamship Clerks,
 Labor Temple, Third Floor, Acme Bldg.,
 Wilmington, N. C.

Your letter of May twenty sixth and June Second; I am
 working hard on this and should be able to advise late
 today or Monday by wire.

J. L. WILKES.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 27.

RALEIGH C. DOWLING,
Notary Public.

Jacksonville, Fla., July 2, 1940.

Z-23-C.

Mr. L. L. Wooten, General Chairman,
Brotherhood of Railway Clerks,
P. O. Box 33,
Wilmington, N. C.

Dear Sir:

We adopted the 10 cents charge on baggage handled by Red Caps, effective July 1, as I previously wired you. We are now working the men on an eight hour basis insofar as a minimum day is concerned, on a split trick within a spread of 16 hours.

103 We are up against the problem of three of our men with one arm, Eddie Kittle, Henry Perry, and Fleming Hawkins; and we also have Henry Perry and Charlie Brooks, who cannot read. John Speights is just able to hobble around, because of old age and infirmity. Andrew Lang is paralytic on one side. Hugh Edmondson is ruptured on both sides. Willie Anderson is asthmatic and in very bad shape, and Charles Brooks is old and infirm. These particular men are quite a load on us, and we would like to reach some understanding with you as to what is best to do with them. I want to be as sympathetic as I can, but at the same time, with a small force of Red Caps on hand, we find that these men are giving us a lot of trouble, due to their inability to perform within reasonable limitations of efficient work. The question of reading and writing is very important when it comes to matching checks and our one-armed men

are particularly handicapped in attaching checks to the baggage with only one arm.

Please give this some thought so that we may find an amicable way to dispose of it when you come done, which I understand will be somewhere around the 15th.

With kindest personal regards, I am

Yours very truly,

(Signed)

J. L. WILKES,

JLW:W.

President-General Manager.

cc to: Mr. W. L. Edwards,
District Chairman.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 28.

RALEIGH C. DOWLING,

Notary Public.

Jacksonville, Fla., July 24, 1940.

T-15-1.

Confidential.

Mr. L. L. Wooten, General Chairman,
Brotherhood of Railway Clerks,
Box 33,
Wilmington, N. C.

Dear Mr. Wooten:

I have placed before my Board of Directors your proposal, as discussed by us, for settlement of the Red Cap problem as to back pay. I doubt if I can hear from them in the three weeks you mentioned, but you can be assured that I will try to do so. I got this letter off the day following your visit to me and I think by the time it gets around

through all the attorneys and passenger agents and others, it is going to take pretty close to three weeks for me to get a definite answer from the four members of my Executive Committee.

I have not yet mentioned the other matter of cooperative participation in the receipts, as proposed by you, as I did not want to confuse the main issue of settlement with that item until we decided on the settlement question first. Incidentally, I have just received information that the New York Central has reached an agreement with Townsend's Red Cap organization which provides, in effect, for either (1) the monthly wages based on the Fair Labor Standards Act minimum, or (2) the total receipts collected and remitted by each Red Cap, after deduction of $1\frac{3}{4}$ cents per parcel or piece of baggage handled and collected for by the Red Cap, will be paid, depending upon which is greater. In other words, out of each 10 cents collected and reported by a Red Cap, the carrier will retain $1\frac{3}{4}$ cents and pay to the Red Cap the applicable minimum

for each hour worked, or $8\frac{1}{4}$ cents for each parcel
104 handled and reported by him, whichever is greater. The purpose of this payment plan, as stated in the agreement is to afford a method by which Red Caps may add to their earnings through increased attention to passenger:

This is exactly the situation which we are running into here. The neglect of some of our Red Caps to passengers is startling.

I also understand that your organization has reached an agreement with the Chicago Union Station Company, under which wages will be paid at the rate of 39 cents an hour for eight hours, or at the rate of $3\frac{3}{4}$ cents per check used, whichever is greater.

I am not sending you a copy of these agreements because I assume that they will be sent to you by your own people in due course, but if you want a copy I shall be

glad to have it made and sent to you, as I only have one copy of these new agreements.

With kindest personal regard, I am

Yours very truly,

(Signed)

J. L. WILKES,

President-General Manager.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 29.

RALEIGH C. DOWLING,

Notary Public.

Jacksonville Terminal Company.

J. L. Wilkes,

President & General Mgr.

Jacksonville, Fla., August 7, 1940.

Mr. L. L. Wooten, General Chairman,

Brotherhood of Railway & Steamship Clerks,

Care Seminole Hotel,

Jacksonville, Florida.

Dear Sir:

In checking over my memoranda I notice I suggested to you that the new one-cent arrangement of the Red Caps be effective July 1st. I intended to say August 1st, and I hasten to correct this.

Our payrolls have been closed for July, and I would not want to go back and mess up the Auditing Department on that month. I trust this is satisfactory to you.

I tried to get you at the Seminole shortly after you left here, but failed.

Yours very truly,

J. L. WILKES,

President-General Manager.

Filed in evidence as PLAINTIFF'S EXHIBIT No. 30.

RALEIGH C. DOWLING,
Notary Public.

105

Jacksonville, Fla., August 9, 1940.

The Jacksonville Terminal Company of Jacksonville, Fla., has inaugurated a plan whereby all hand baggage handled by Red Caps is being checked and a charge of 10 cents per parcel or bag is being charged for Red Cap service, paid to the Red Cap by passengers, and turned in by him to the Terminal Co.

It is agreed that effective August 1, 1940, the Jacksonville Terminal Co. will compensate its Red Caps on the following basis:

1. Red Caps will be paid the hourly wage established by the Hours and the Wage Law, or orders of the Administrator, at the minimum set in such orders or law.

2. Captains will be compensated at the rate of ten (10) cents per hour above the minimum; said ten (10) cents per hour to be paid by the Company and not included in item 3.

3. Daily records of each Red Cap's hours, tags sold, and money re-remitted, will be kept by the Company; at the end of each 15 day period or pay roll period, all money received from sale of checks, etc., by Red Caps will be totaled, wages paid to Red Caps, deducted, after one (1) cent per parcel or tag has been set aside for Company expenses, the remaining nine (9) cents used to pay wages of Red Caps, and Captains, other than the ten (10) cents per hour for Captains covered in Item 2.

If the sum total of nine (9) cents per parcel handled and or tags sold is greater than the wages paid to Red Caps

for that period, the remaining funds will be divided among all Red Caps on the basis of hours worked during the pay roll period, so that all Red Caps will share alike for each hours service, from this fund. If the nine (9) cents per parcel handled is not sufficient to pay wages outlined in item (1) of this agreement, the Terminal Co. agrees to pay the wages as outlined in item 1.

4. Upon request of the General Chairman, the Jacksonville Terminal Company will review with him the earnings of the Red Cap forces, from time to time, and may check the records of any or all men in Red Cap Service.

This wage agreement to become a part of working agreement effective June 16th, 1939.

(Signed)

JACKSONVILLE TERMINAL CO.,

J. L. WILKES,

President-General Manager.

BROTHERHOOD OF RAILWAY & S. S.
CLERKS, FREIGHT HANDLERS,
EXPRESS AND STATION EM-
PLOYES,

(Signed) L. L. WOOTEN,

General Chairman.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 31.

RALEIGH C. DOWLING,
Notary Public.

106 Jacksonville Terminal Company.

J. L. Wilkes,
President & General Mgr.

Jacksonville, Florida, August 14, 1940.

T-15-1.

Mr. L. L. Wooten,
General Chairman,
Brotherhood of Railway and Steamship Clerks,
Box 33,
Wilmington, North Carolina.

Dear Sir:

Referring to our several conferences, during which you advised me that it was going to be necessary for you to enter suit on behalf of our Red Caps for refund of tip money deducted as salaries under the Wage and Hours Act, and you agreeing to wait until the end of this week, or approximately four weeks, for me to consider your proposals in lieu of suit and advise our final determination on such proposals.

This question, and your proposal to settle on the basis of a refund of tips deducted without recourse to penalty, has been carefully considered by this Company and its owning carriers.

Several suits of a similar nature have already been brought to issue and at least some of them are now before the Appellate Court in the Form of appeals, and these cases seem to have the same main question of issue as is

involved here, i. e. whether tips can be considered wages, under all the circumstances involved in Red Cap work on railroads, under the Wage and Hours Act. Under these circumstances it seems to us that there will be nothing to gain on the part of your organization by entering suit against the Jacksonville Terminal Company since the same identical questions are now up for decision by the Appellate Courts, or will be shortly. Even though it is to be done, and you were successful in the lower Courts, we cannot see why the final settlement will be expedited over waiting to see what the outcome will be on the cases now pending. It will probably have the effect of unsettling our forces and disturbing the satisfactory relations between your organization and the Terminal Company which have existed for years, and in the final analysis it would seem to me that the same results could be just as quickly obtained after the Dallas or some other case is decided where similar question is at issue.

Under the circumstances we feel that we cannot accept your proposal at this time, and we express the further sincere hope that after mature deliberation you will decide that it will be unnecessary to drag each of us into Court on this matter, which is the subject of a strongly divided opinion of both lawyers and laymen, and which apparently seems to have considerable merit in the contentions of each viewpoint. The cases now on appeal will certainly reach a final decision within a reasonable time and I think we ought to await such decision.

Yours very truly,

J. L. WILKES,
President-General Manager.

Filed in Evidence, as PLAINTIFF'S EXHIBIT No. 32.

107

RALEIGH C. DOWLING,
Notary Public.

Agreement between the Jacksonville Terminal Company and Employes herein named represented by The Brotherhood of Railway and Steamship Clerks Freight Handlers, Express and Station Employes.

Scope.

Rule 1—These rules shall govern the hours of service and working conditions of all Red Caps, Red Cap Captains, and other employes handling hand baggage not already covered by agreement.

Seniority.

Rule 2—Seniority of employes covered by this agreement begins when they are or were assigned to duty by the Company. Senior employes will be assigned to preferred watches and or shifts upon request.

Seniority Districts.

Rule 3—All employees covered by this agreement shall be in one seniority district.

Leave of Absence.

Rule 4—Leave of absence may be granted employes when they can be spared without detriment to the operation of the property, and in case of physical disability or sickness indefinite leave of absence will be granted. If leave of absence extends beyond thirty days except in case of physical disability and sickness the general Chair-

man will be advised and if the leave of absence extends beyond 60 days an agreement as to its extent will be reached between the Company and representative of the employees.

Returning After Leave of Absence.

Rule 5—An employee, returning after leave of absence may exercise his seniority and displace any junior employee. Employees displaced by his return may exercise their seniority in the same manner.

Reducing Forces.

Rule 6—When reducing forces seniority rights shall govern. When forces are increased, employees shall be returned to service in the order of their seniority, providing this is done within a period of twenty four (24) months; otherwise seniority standing is forfeited. Employees desiring to avail themselves of this rule must file their address in duplicate with the stationmaster, or other officer in charge as designated by the Company, at the time they are cut off the extra board, advising promptly in duplicate of any change in address. Employees failing to file their address when cut off the extra board or failing to file any change in address or failing to return to the service within seven days after being notified by mail or telegram sent to the last address given or giving satisfactory reason for not doing so will be considered out of the service. The officer will sign and return to the employee as his receipt one copy of the address as filed.

108

Extra Board.

Rule 7—There shall be maintained an extra board and when employees are cut off regular assignment they may exercise their seniority over any junior employee on the

extra board. Short vacancies in regular positions will be filled by assigning the senior extra man to the position until the regular occupant returns. The number of men necessary to maintain the extra board will be agreed to from time to time between the employes or their representative and the Company and only such employes as are necessary to properly protect the work will be carried on the extra board. Employes carried on the extra board will not be required to comply with rule 6 but when cut off the extra board they must file their address as outlined in rule 6, within 10 days from the time they are notified that they are cut off the extra board.

Duties of Red Caps.

Rule 8—Employes covered by the rules may be required to perform any and all duties of Red Caps consisting of the handling of hand baggage, for passengers, invalid rolling chairs, stretchers, and in other ways assisting passengers in and around the station and in and around trains while at the station; and they will be allowed to use hand trucks to perform this work but will not be required to do any janitor work or work covered by other agreements. The Company will have the right to assign the handling of rolling chairs, stretchers and similar special work to any of the employes on duty.

Rates of Pay.

Rule 9—The hourly rate of pay of Red Caps shall not be less than that established by the wage and hours law and in addition thereto captains shall be paid \$10.00 per month. In consideration of the low pay and terms of this agreement, employes covered by this agreement will be allowed to keep such tips as they might receive without being required to make any accounting to the Company.

Hours of Service.

Rule 10—It is agreed that where service is intermittent, employes may be held on or for duty for nine hours in a calendar day with the minimum pay of four hours at usual rate and if held on or for duty in excess of nine (9) hours in any calendar day they will be paid for actual hours held beyond nine (9) hours at pro rata rate. If employes get off of their own accord during any calendar days assignment they will be paid for hours worked or held for duty on a prorata basis as outlined in this rule.

Rosters.

Rule 11—Seniority rosters for all employes covered by these rules showing name and proper dating will be posted in agreed upon places accessible to all employes affected. The roster will be revised and posted in January and July of each year and will be open to protest for a period of sixty (60) days from date of posting. Upon presentation of proof of error by an employe or their representative such error will be corrected. The duly accredited representative of the employes will be furnished with copy of all rosters.

It is understood that if the dating shown opposite any name goes over one protest period of sixty days (60) such dating will not thereafter be changed unless protest has been made and is under investigation at the time the first sixty (60) days period in which protest can be made, has expired.

Positions Abolished.

Rule 12—Employes whose regular positions are abolished may exercise seniority rights over junior employees on regular positions and or on the extra board providing

this is done within a period of ten (10) days. Other employees affected may exercise their seniority in the same manner. Employees who do not desire to exercise their seniority may file their address as provided in rule 6 at the expiration of ten (10) days and be subject to call when forces are increased as outlined in rule 6.

Re-Entering the Service.

Rule 13—Employees voluntarily leaving the service will if they re-enter, be considered new employees.

Validating Records.

Rule 14—The application of new employees will be approved or disapproved within sixty (60) days after the applicant begins work, unless a longer time is mutually agreed to by the Management and representative of the employees. In the event of applicant giving false information, this rule shall not apply.

Discipline and Grievance Investigation.

Rule 15—An employee who has been in the service more than sixty (60) days or whose application has been formally approved shall not be disciplined or dismissed without investigation, at which investigation he may be represented by an employee of his choice or duly accredited representatives. He may, however, be held out of service pending such investigation. He shall, upon request, have not to exceed five (5) days advance notice of such investigation and be apprised in writing of the charges against him. The investigation shall be held within ten (10) days of the date when charged with the offense or held from service. A decision will be rendered within 10 days after the completion of investigation.

Hearing.

Rule 16—An employe dissatisfied with the decision shall have a fair and impartial hearing before the next proper officer provided written request is made to such officer and a copy furnished to the agent or officer whose decision is appealed, within seven (7) days of the date of the advice of the decision. Hearing shall be granted within seven (7) days thereafter, and decision rendered within seven (7) days of the completion of the hearing.

Appeal.

Rule 17—If an appeal is taken from his hearing it must be filed with the next higher official and a copy furnished the official whose decision is appealed within ten (10) days after the date of the decision.

The hearing of the appeal shall be held within ten (10) days and a decision rendered within five (5) days after completion of hearing.

Grievances.

Rule 18—An employe who considers himself otherwise unjustly treated shall have the same right of hearing and appeal as provided above if written request is made to his immediate superior within seven (7) days of the cause for complaint.

Representation.

Rule 19—At the hearing or on the appeal, the employe may be assisted by one or more duly accredited representatives.

Right of Appeal.

Rule 20—The right of appeal by employes or their representatives in the regular order of succession and in the manner prescribed, up to and inclusive of the highest official designated by the railroad to whom appeal may be made, is hereby established.

Advice or Cause.

Rule 21—An employe, on request will be given a letter stating the cause of discipline. A copy of all statements made a matter of record at the investigation or on the appeal will be furnished on request to the employe or his representative.

Exoneration.

Rule 22—If the final decision decrees that charges against the employe were not sustained, the record shall be cleared of the charge; if suspended or dismissed, the employe shall be reinstated and paid for all time lost.

Date of Suspension.

Rule 23—If an employe is suspended, the suspension shall date from the time he was taken out of the service.

Transportation.

Rule 24—Committees of employes will be granted transportation when possible to obtain, and necessary leave of absence for investigation, consideration and adjustment of grievances.

Organized Membership.

Rule 25—No discrimination will be made in the employment, retention or conditions of employment of employees because of membership or non-membership in labor organizations.

Pending Decision.

Rule 26—Prior to the assertion of grievances as herein provided, and while questions of grievances are pending, there will be neither a shut-down by the employer nor a suspension of work by the employees.

Attending Court.

Rule 27—Employees taken away from their regular assigned duties at the request of the Management, to attend Court or to appear as witnesses for the Company, will be furnished transportation and will be allowed compensation equal to what would have been earned had such interruption not taken place, and, in addition, necessary actual expenses while away from headquarters. Any fee or mileage accruing will be assigned to the Company.

111

General.

Posting Notices.

Rule 28—Suitable bulletin board will be provided for posting notices of interest to employees covered by this schedule and employees will be allowed to post notices of interest to themselves on this bulletin board.

Equipment Furnished.

Rule 29—Hand trucks, uniforms, badges and caps, required by the Company to perform the work covered in

this agreement will be furnished by the Company without cost to the employees.

Free Transportation.

Rule 30—Employees covered by this agreement and those dependent upon them for support will be given the same consideration granting free transportation as is granted other employees in service.

General Committees representing employees covered by this agreement will be granted the same consideration as is granted general committees representing employees in other branches of the service.

Service Letters.

Rule 31—Employees whose applications are approved and who have been in the service sixty (60) days or longer, will, upon request, if they leave the service of the Company, be furnished with service letter showing length of time in service, capacity in which employed and cause of leaving.

Effective Date

Rule 32—This agreement shall be effective (.....), and shall continue in effect until it is changed as provided herein or under the provision of the Railway Labor Act as amended June 21, 1934.

Should either of the parties to this agreement desire to revise or modify these rules 30 days' written advance notice, containing the proposed changes, shall be given

and conference shall be held immediately on the expiration of said notice unless another date is mutually agreed upon.

.....
 President-General Manager, Jacksonville Terminal Company.

.....
 General Chairman, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 33.

RALEIGH C. DOWLING,
 Notary Public.

Certificate.

I, Gustav Peck, do hereby certify that I am the presiding officer named and designated, by an order of the Administrator of the Wage and Hour Division, United States Department of Labor, dated June 5, 1939, published in the Federal Register at Washington, D. C., on June 7, 1939, volume 4, number 109, pages 2306-2307, to take testimony and hear argument submitted with respect to matters set forth in said order. I further certify that the mimeographed copy of Findings and Recommendations to which this certificate is attached are those made by me pursuant to said order.

(S.) GUSTAV PECK.
 (Gustav Peck)

Dated: October 2, 1940.—

Filed in Evidence as PLAINTIFF'S EXHIBIT No. 33.

RALEIGH C. DOWLING,
Notary Public.

113 Findings and Recommendations of the Presiding
Officer.

September 28, 1939.

R-445.

For release Saturday, October 14, 1939.

Before the United States Department of Labor,
Wage and Hour Division,
Washington, D. C.

In the Matter of Hearing on Proposed Amendments of
Part 516 (Records to be Kept by Employers) of the
Regulations Issued Under Section 11 (c) under the
Fair Labor Standards Act of 1938.

Red Caps or Hand-baggage Porters.

The International Brotherhood of Red Caps, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and sundry other parties having filed petitions with the Administrator for an amendment to Part 516 of Regulations issued by the Administrator under authority of Section 11 (c) of the Fair Labor Standards Act of 1938—Title 29, Labor, Chapter 5—Wage and Hour Division, the Administrator gave notice of a public hearing to be held at 939 D Street,

Northwest, Washington, D. C., at 10 o'clock A. M., June 27, 1939, before the undersigned as Presiding Officer. Subsequently, when it was found necessary to provide larger seating capacity, the place of the hearing was changed to the auditorium of the Department of Commerce Building.

Pursuant to notice, the undersigned convened the hearing and an opportunity was afforded to all who appeared during a two day session to present testimony and to question witnesses through the Presiding officer. At the hearing, the International Brotherhood of Red Caps and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, and Express and Station Employees, claiming to represent together the majority of the Red Caps, filed petitions with the Administrator to amend Part 516 of the Regulations. The petitions were supported by other interested parties. The Association of American Railroads, which appeared on behalf of substantially all of the employers of red caps in the United States, opposed any changes in the present regulations. Briefs and additional statements were filed subsequent to the hearing by various parties. At the request of the Association of American Railroads, the record was kept open until August 15 for this purpose. The three main parties in interest were then given until September 15, to furnish argument upon the final briefs submitted.

Proposed Amendments to Records Regulations; the Position of The Association of American Railroads.

The term "red cap" as used hereafter includes any employee whose duties consist of, or include, handling passengers' baggage and other articles at various passenger stations. There was no argument on the supposition

115 that these employees, of which there are approximately 6000 in the United States,¹ are engaged in "commerce" and are entitled to the benefits of the minimum wage provisions of the Act.²

The Administrator, having received many complaints alleging that in a number of instances red caps were not being paid the minimum wage, called the hearing on the question:

"What, if any, amendment should be made to Part 516 of the Regulations issued by the Administrator under Section 11 (c) of the Fair Labor Standards Act of 1938 to require special or additional records to be kept by employers of red caps or hand-baggage porters."

An employer subject to provisions of the Act is required under Section 516.1 of the Regulations to make and preserve records showing, among other things, "total wages paid for each workweek". Paragraph (d) of Section 516.4 defines the term "wage or wages" as follows:

"For the purpose of these Regulations, the term 'wage' or 'wages' means all remuneration for employment of whatsoever nature whether paid on time work, piece work, salary, commission, bonus, or other basis."

¹ The International Brotherhood of Red Caps estimates that there are between 6000 and 8000 of these employees. Returns to a questionnaire of the Interstate Commerce Commission filed in 1938 by 250 carriers covering their operations at 350 stations indicated approximately 4300 red caps in cities of over 100,000 population.

² The receivers of the Seaboard Air Line, through counsel, indicated that their participation in the proceeding was not to be taken as constituting an admission on their part that red caps "under all circumstances" were employees within the meaning of the Railway Labor Act. (99) The Association of American Railroads, representing substantially all the carriers, recognizes that red caps are employees of the railroads (365). (Figures in parenthesis here and elsewhere in this Report, refer to pages of transcript.)

Under this definition, the carriers at present show in their records as "wages paid" to red caps in their employ the tips and gratuities reported as received by the red caps from passengers or other persons. The two principal petitioners request that the Regulations be amended to prohibit the recording of tips as "wages" paid by the employer.

The International Brotherhood of Red Caps proposes an amendment to accomplish this purpose which would be known as Section 516.6 and would provide that:

116. Employers of red caps or hand-baggage porters shall not include directly or indirectly in their records of wages, extra wages, additions to wages or total wages required to be kept by Section 516.1 hereof any amounts received by red caps or hand-baggage porters as tips or gratuities from person other than their employers, such as passengers and the like. In no event may tips or gratuities to red caps or hand-baggage porters be counted as part of the wages required by the Fair Labor Standards Act.

The Brotherhood of Railway and Steamship Clerks proposes that:

Part 516, Section 516.4 (d) be amended by adding after the final words of said paragraph (d) "or other basis" the following language: "but shall not include tips or gratuities received by employees of employers specified in Section 13 (b) of the Act from passengers or persons other than the employer."

The Association of American Railroads contends that the present records regulations are "definite and clear" (363) and adequately serve the purpose for which they

were intended. The Association contends that the amendment of the records regulations as proposed by petitioners would constitute an administrative ruling not authorized by the terms of the Act. Their position is that the amendments attempt under the guise of a records regulation to determine a matter of substance which only the Courts can decide; that is the question whether the present arrangement by which red caps record the tips and gratuities received and the railroad terminal companies agree to guarantee that each and every red cap will receive at least the minimum wage as in conformity with Section 6 of the Fair Labor Standards Act.

In order to understand clearly the issues raised by the contentions of the parties, it is necessary to consider the history and details of the present arrangement by which the carriers compensate red cap employees. This report will therefore consider in turn:

117 The "Accounting and Guarantee" Arrangement Adopted by the Carriers.

Results Growing Out of the Operation of the "Accounting and Guarantee" Arrangement.

Finding and Recommendation.

The "Accounting and Guarantee" Arrangement Adopted by the Carriers.

Prior to the enactment of the Fair Labor Standards Act, most red caps were forced to rely upon tips and gratuities given them by the traveling public as their sole source of income. In only exceptional cases and these were generally where red caps also had additional assignments, were they paid small regular salaries to sup-

plement the receipt of tips and gratuities. Prior to October 24, 1938, in the Union Station of Omaha, Nebraska, red caps were called "ushers" and were paid \$3.40 per day under a union agreement; in the St. Paul, Minnesota, terminal red caps were called "porters" and were paid about \$70.00 a month. (Exhibit 27.) By far the majority of the red caps, perhaps up to 80 per cent or more of those employed in these duties, received only the amounts which accumulated as tips from the traveling public. Of an estimated 4300 red caps employed in 1938 in cities of over 100,000 population, returns to a questionnaire filed with the Interstate Commerce Commission by employers of red caps show that 3,150 received compensation only through tips.³

Red caps were employed on the premises of the carriers subject to the regulation and control of the railroad or terminal companies, to carry baggage and packages and to perform other services for passengers.

118 From time to time they were asked to carry out various other duties for the terminal, such as cleaning the station platform, carrying messages, and paging passengers.

Since October 24, 1938, one railroad entered an agreement with a union covering all red caps employed and classifying them as "porters". This agreement provides for the payment of wages by the railroad at or above the minimum provided in the Act, and excludes tips. (21, 49, 50 and Exhibit 27.) By far the majority of red caps, however, receive compensation only through the tips received from the traveling public.

When the Fair Labor Standards Act was enacted, the carriers, according to their testimony, gave serious con-

³ Interstate Commerce Commission, Ex. Parte 72 (Sub-No. 1), Decided September 29, 1938.

sideration to the problems raised by the Act to determine "whether they could devise any way to avoid having saddled upon them an additional cost of operation of upwards of two million dollars per year", (365). While red caps were admittedly their employees, they did not feel impelled to pay them 25¢ per hour out of payroll funds. Instead the carriers instituted the "accounting and guarantee" arrangement which they believed would meet the requirements of the law. Under this arrangement, each red cap is requested to report the amount of tips received every day. There is no change in the method of compensation of red caps; but if the total amount received from the public is less than 25¢ per hour the carrier agrees to make up the difference.

This arrangement was designed to avoid as far as possible any payment to red caps from the payroll funds of the carriers. As the spokesman for the carriers expressed it:

"The only change it proposed to make from the one that has been in effect all the years before was simply to add the element of a guarantee to these men.

119. These men had been working all the years, generally speaking, for the tips they could get. The change that was proposed was to let them continue to do that, but add the one additional element of a guaranty to them that if they didn't make the minimum required by the law, the railroad would make it up to them." (369-370.)

Pursuant to this plan each carrier issued the following notice to its red caps (or another notice similarly phrased):

.....
(Place and Date)

To Those Carrying Hand Baggage of Passengers or Otherwise Assisting Patrons of the Railroad on Railroad Premises, Commonly Called Red Caps:

.....
(Location)

In view of the requirements of the Fair Labor Standards Act, effective October 24th, 1938, and in consideration of your hereafter engaging in the handling of hand baggage and traveling effects of passengers or otherwise assisting them at or about stations or destinations, it will be necessary that you report daily to the undersigned the amounts received by you as tips or remuneration for such service.

The carrier hereby guarantees to each person continuing such service after October 24, 1938, compensation which together with and including the sum of money received as above provided, will not be less than the minimum wage provided by law.

You are privileged to retain subject to their being credited on such guarantee all such tips or remuneration received by you except such portion thereof as may be required of you by the undersigned for taxes or any character imposed upon you by law and collectible by the undersigned.

All the matters above referred to are subject to the right of the carrier to determine from time to time the number and identity of persons to be permitted to engage in said work and the hours to be devoted thereto, to establish rules and regulations relating to the manner,

method and place of rendition of such service, and the accounting required.

.....
(Name of Railroad)

.....
(Name & Title of Officer⁴
Signing)

120 In most instances copies of the notice were served personally upon each red cap and a receipt was required (89, 169, 175, 228). Verbal and written protests were made by some of the employees, but they were told that they must sign the receipts or cease working (82, 159, 160, 169, 204, 226-228, 239, 270-272). The record shows that in one instance the notice was posted on the bulletin board and no request was made that the red caps employed in that station sign it (324-325).

The contention of the Association of American Railroads is that these notices served upon the employees constituted enforceable contracts entered into as a condition of employment and resulting in a constructive turning over of tips to the employer and payment back to the employee.

Results Growing Out of the Operation of the "Accounting and Guarantee" Arrangement.

Testimony offered at the hearing shows convincingly that the records kept by the carriers of tips reported as received by red caps do not represent accurately the tips received by these men. Under the present minimum, red caps must receive wages at the rate of two dollars for working an eight-hour day. The record is replete with statements that red caps, unable to earn the mini-

⁴ Exhibit 8 of Record of Hearing.

mum in tips during the day, falsely register that amount on the record slips provided by the employer (32, 57-63, 82-84, 161, 192). Numerous red caps testified at the hearing that they padded their reports when they made less than twenty-five cents an hour in tips (192, 328). The reason for this false reporting of tips was said to be the fear of discipline or discharge by the carriers for failing to report the minimum (146, 161, 171, 177, 310-314). However, it appears to have become well-nigh the universal practice to report \$2.00 each and every day, even in cases where the men have always received considerably more than \$2.00 in the past; such falsification, initiated by the red caps themselves and continued on the advice of their union officers, presumably on the ground that the railroads themselves are not interested in accurate records beyond the receipt of \$2.00 per day, (349) must have its basis in other considerations than the fear of discipline or discharge. The railroads have acquiesced in this practice.

There was testimony that a station master told the employees to report 25 cents an hour regardless of whether the amount reported was actually earned (170). One witness testified that the station master in a large city had discontinued requiring the men to report and advised the red caps that henceforth the railroad would report 25 cents an hour for the men (137). Witnesses testified that several of the red caps were discharged for failing to report twenty-five cents an hour (160, 171). The record contains allegations that false reports of tips were made by red caps from fear of discipline of the possible loss of employment, whether such fears were justified or not. On the other hand, the Association of American Railroads has submitted documentary evidence supported by affidavits to show that at many of the stations where these specific charges were made the rail-

roads have repeatedly made up the difference between amounts reported by the men and the guarantee and that at these stations no reductions in the number of red caps employed have been made as a result of the guarantee.

122 The "accounting and guarantee" arrangement by which most of the carriers compensate their red caps is of necessity applied by minor company officials—local officers such as station masters, head porters, and station agents. It appears from the record that many of these officials have made it be known in one way or another that the red caps ought to report the receipt of two dollars for eight hours work regardless of the amount actually received. The possible misapplication of the arrangement by subordinate officials is admitted by Counsel for the Association of American Railroads in the following statement (392):

"I have had personal experiences, and everyone else has had, of subordinate officers not carrying out strictly the intent of the instructions that they get from above, and I wouldn't be surprised to find that in some instances there have been actions of the sort that have been charged here—that is, certain men in immediate charge of these fellows, for fear of criticism by someone above them, indicated to these fellows what they wanted them to do."

The testimony substantiates this statement and fully demonstrates the impossibility of determining from the records of carriers kept to conform with the regulations of the Wage and Hour Division whether red caps are receiving the minimum wage provided by the Act.

Memorandum submitted subsequent to Hearing, *passim*.

Part 516 are Regulations and Records to be Kept by Employers issued Pursuant to Section 11 (c) of the Fair Labor Standards Act. The carriers appear to have taken rather lightly their own obligations to keep accurate records. In answer to a charge made at the hearing that "red caps are required to turn in slips showing checks of \$2.00 in tips before they can go to work so that the records will be in shape" (137), the carrier replied in an affidavit that the slips of the red caps "are deposited in a box * * *. It may be that they are placing the report in the box before they complete their day's work. For this the company is not responsible". (Memorandum, Caption 5.) This is a totally unwarranted assumption.

123 It is the Company's obligation to keep accurate records under the law and the regulations and this shedding of responsibility, directly traceable to the "accounting and guarantee" arrangement, is indicative of the lighthearted attitude taken by some of the officials of the carriers toward their obligation under the Act. In another terminal the form of the slip required to be filled out by the red caps was changed after the Act was in effect 5 months and thereafter it did not even have a provision for reporting tips received. The Company alleges, however, that "red caps have specific instructions at the end of each payroll period when they report to the auditor's office to pay Railroad Retirement Act taxes to report at that time if during the period they failed to receive in tips an amount equal to the sum they were entitled to receive under the Fair Labor Standards Act. It is generally understood by the red caps that the Terminal Company will pay any difference upon red caps reporting the amount necessary to meet the minimum requirements". (Memorandum, Caption 5.) This is only another indication of the casual handling by subordinate officials of the obligations of the carriers under the Act.

In many instances, testimony of petitioners' witnesses has been controverted by affidavits filed by the Association. These affidavits have been studied with care and have been given full weight in the consideration of this problem. Thus in many cases dismissal of red caps was shown to have been not for the purpose of coercing them to report earnings of at least \$2.00 a day but because of infractions of rules, neglect of duty, or merely to reduce costs. Furloughs have often been made on a strict seniority basis. The testimony of the representatives of the Association at the hearing shows that in numerous cases tips when below the minimum wage established by law are in fact regularly and consistently supplemented by payments from the carriers (266-268, 406-409).⁶

124 In these cases the amount of the check received by the individual red cap from the carriers is usually small, ranging from a few cents to five or six dollars each fifteen-day payroll period. The record indicates that the red caps at a few stations receive make-up checks from the railroads each period (406-409, 413). These stations usually have little of the more lucrative tipping assignments and additions to the tips received, by red caps must be made constantly.

In many cases where red caps are unable to earn two dollars for eight hours of work, the assignments given them by the carriers are responsible. For red caps are at times required to perform other duties which prevent them from carrying the bags of passengers and thereby diminish their opportunities to earn tips.⁷ In many sta-

⁷ For example, in one terminal the red caps are each required to run an elevator one day a week. In order to comply with this requirement the red caps have themselves hired a man to run the elevator. (148.)

⁶ One large railroad in the seven months preceding April 30, 1939, paid \$12,075.59 to its red caps as the difference between their reported tips and the minimum wage required by statute (412-413).

tions red caps perform janitor work for the carriers in addition to their red cap duties. (258, 259, 288.) The record shows that red caps often mop, sweep, and clean the stations and station platforms, wash windows, page passengers, care for children traveling alone, assist in transporting ill passengers, call trains, collect and deliver mail, run errands, and perform other services which

are not expected to yield tips and which therefore diminish their opportunities to earn at least 125. 25 cents per hour in tips. (12, 13, 152, 172, 256, 259, 263). In some stations the small amount of traffic or the type of people traveling (commuters and college students) prevent the red caps from receiving amounts in tips equal to 25 cents an hour. As indicated in the record, some of the railroads recognize these deficiencies in such stations and have consistently made up the difference between the tips actually received and the legal minimum. However, it does not appear that this is a common practice and all too often the red cap for fear of discipline or the possible loss of his job is forced to bear the burden of the poor location or assignment.

Even in terminals with a large flow of passenger traffic some red caps are assigned to watches and tricks which cannot yield an average earning of twenty-five cents an hour. The assignments are sometimes for a few hours in a single day, one day in the week, or permanent. In order to prevent the concentration of such assignments some, but not all, terminal companies provide a complete rotation of the red caps in the various posts of the station; the taxicab stand, the day coaches, the Pullman coaches, the locals, and the entrances usually used by passengers arriving and leaving the station on street cars (315-318). Of course if red caps were free to work in the terminals wherever they thought they could best earn tips, they would not work the less desirable positions.

Since the effective date of the Act, most of the carriers have taken the position that if the tips reported by the red caps consistently fall below the minimum wage the logical inference is that the particular station has too large a number of red caps in proportion to the amount of traffic and as a consequence red caps are laid off. However, in the situations set forth in the preceding paragraphs where red caps sweep, clean, and perform other services around the stations or work in positions or in stations where they have little opportunity to earn twenty-five cents an hour by carrying bags for passengers, a failure to list the minimum as being received in tips would not necessarily indicate a lack of diligence and assiduity on the part of the red caps or even an excessive staff of red caps. In such cases it is doubly important that red caps be protected in their right under the law to be paid no less than twenty-five cents per hour.

The present form of time cards kept by the carriers for red cap employees makes no provision for a segregation of the various types of work which they perform and hours worked on each type of work. The records kept by the carriers, although they differ slightly from company to company, usually provide columns for listing the number of hours worked by each red cap, tips received, deductions made for taxes or other purposes, and the additional sum paid by the carrier to make up the difference between the reported tips and the applicable minimum wage (397-404). At the small stations and terminals it is common for red caps to do janitorial and related work, but in these places it is also more common to hire men as cleaners and to assign them at various times during the day to red cap duty. The usual wage for cleaners, while it is different in different areas, is said to be considerably more than the minimum required

by the Fair Labor Standards Act. In only one notable instance was the record kept by the carrier substantially different. At this terminal the daily report form in use at the date of the hearing provided spaces for itemizing (1) time consumed in waiting on each passenger; (2) number of parcels handled; (3) tips received from each passenger. Each red cap, according to the testimony, received credit as hours worked only the time spent
 127 in waiting upon the passengers. The remaining time during which he was held for work at the terminal was not included in the computation of his hours on duty. (57-63.) Counsel for the carriers conceded at the hearing that this was improper and in the memorandum filed subsequent to the hearing stated that a retroactive adjustment is being made and that in the future this terminal will calculate the earnings of red caps on the basis of time held for work. (Memorandum p. 9.)

According to the testimony of many of the red caps there has been an appreciable decline in the amount received as tips since the passage of the Act. (38, 39, 70, 88, 165, 171, 181, 185, 186, 192, 205, 206, 450-460.) The usual explanation is that the public has mistakenly been given the impression through the press that red caps now receive a regular wage from the carriers and that tips are no longer their sole support. Several witnesses estimated that their own income from tips had declined about one-third. (71, 171.) Another witness testified that tips had declined but that the cut in the force had had a counteracting effect upon his receipts. (88.) The carriers subsequently submitted affidavits by station masters and some red caps that to the best of their knowledge where tips may have declined after the effective date of the Act, they soon returned to customary levels. (Memorandum, Captions 3 and 5.)

In the light of all of the evidence there can be no conclusion other than that the pay roll records of the carriers for Red Caps generally do not accurately record the data as to wages paid. It also appears that there is grave legal doubt as to the validity under the Fair Labor Standards Act of the accounting and guarantee arrangement which the carriers have used. It is, therefore, recommended:

1. That the Division take immediate steps through Court action to determine the validity of the accounting and guarantee arrangement under which many Red Caps are employed.

2. And, pending an authoritative Court decision determining the validity of the accounting and guarantee arrangement, that employers be required to keep records which show separately from other amounts paid as wages, the amount of tips which are claimed by the employer to be wages paid.

3. It is also desirable that records kept by employers for employees engaged in occupations in which tipping may occur shall record the number of hours worked each week in such tipping occupations separately from the number of hours worked in other occupations, if the employee accounts for or turns over to the employer the amount of tips received from third persons.

(S.) GUSTAV PECK,
(Gustav Peck)
Presiding Officer.

October 12, 1939.

Filed in Evidence as PLAINTIFF'S EXHIBIT No. "A"
for identification.

RALEIGH DOWLING,
Notary Public.

129 Receipt for Back Wages Due Under the Fair
Labor Standards Act.

Date August 17, 1939.

Received \$10.05 from Jacksonville Terminal Company,
Located at Jacksonville, Florida, due under the provisions
of the Fair Labor Standards Act of 1938 for the period
of my employment from October 24, 1938, to August 15,
1939.

It is my understanding that by signing this receipt I
do not forfeit or release my right to sue for such addi-
tional amount as may be due under Section 16 (b) of the
Act.

Signed: WALTER BURCH,
Address: 708 1/2 Davis Street,
Jacksonville, Florida.

.....
(Witness' Signature)

225 Post Office Building,
Jacksonville, Florida.
(Witness' Address)

Filed in Evidence as DEFTS.' EXHIBIT No. A for Identification.

RALEIGH C. DOWLING,
Notary Public.

130 Revised Agreement Between the Jacksonville Terminal Company and Employees Herein Named Represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

Effective February 1, 1937.

131 Jacksonville Terminal Company.

Agreement Between the Jacksonville Terminal Company and Employees Herein Named Represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

Scope.

Rule 1.—These rules shall govern the hours of service and working conditions of the following employees subject to the exceptions noted below:

Group (1) Clerks—(a) Clerical Workers.

(b) Machine Operators.

Group (2) Other office and station employees—such as office boys, messengers, chore boys, train announcers, gatemen, baggage and parcel room employees, train and engine crew callers, telephone switchboard operators, elevator operators, office, station and warehouse watchmen and janitors.

Group (3) Laborers employed in and around stations, storhouse, and warehouses.

Exceptions.

These rules shall not apply to the following:

(a) Individuals where amounts of less than \$30.00 per month are paid for special service which take only a portion of their time from outside employment or business; or to individuals performing personal service not a part of the duties of the Company; nor to the personal office force listed below:

132. (b) All employees in the office of the President-General Manager,

(c) Chief Clerk and Stenographer in office of the Comptroller,

(d) All employees in office of the Treasurer,

(e) Ticket Agent,

(f) General Mail and Baggage Agent,

(g) One Assistant General Mail and Baggage Agent,

(h) Chief Clerk and Stenographer in office of Master Mechanic,

(i) Chief Clerk in office of Purchasing Agent-Store-keeper.

Note: Qualified employees covered by this agreement will be given preference on excepted positions over out-

siders. Additional excepted positions will not be created without agreement with accredited representatives of the employees.

Definition of Clerical Workers.

Rule 2—(a) Clerical Workers: Employees who regularly devote not less than four (4) hours per day to writing and calculating incident to keeping records and accounts, rendition of bills, reports, and statements, handling of correspondence and similar work.

(b) Machine Operators: Employees who regularly devote not less than four (4) hours per day to the operation of office or station mechanical equipment requiring special skill and training—such as typewriters, calculating machines, bookkeeping machines, dictaphones, and other similar equipment.

133 The foregoing definitions—paragraphs (a) and (b) shall not be construed to apply to:

(1) Employees engaged in assorting tickets, waybills, etc., nor to employees operating office or station appliances or devices not requiring special skill or training—such as those for duplicating letters and statements, perforating papers, addressing envelopes, numbering claims and other papers, adjusting dictaphone cylinders and work of like nature; nor to employees gathering mail or other similar work not requiring clerical ability.

(2) Office boys, messengers and chore boys, or to other employees doing similar work.

(3) Students and apprentices qualifying for special clerical work or as machine operators.

(4) Employees performing manual work not requiring clerical ability.

Seniority.

Rule 3—Seniority begins at the time employee's pay starts on the seniority district and in the class to which assigned.

When two or more employees enter upon their duties at the same hour on the same day, employing officers shall at that time designate respective rank of such employees.

New employees or employees from other seniority groups filling positions or vacancies of 30 days or less duration, will not establish seniority until they are assigned to a regular position. Their seniority will then date from the day they began work on that position.

134 Clerks holding Group (1) positions who were promoted from Group (2) positions shall be permitted to return to that class Group (2) when their positions in Group (1) is abolished (provided they are unable to secure another clerical position by exercise of seniority) under the following conditions:

1. They will retain their seniority dating in Group (2) which they held at the time of promotion and shall be allowed to exercise such seniority rights when returning to Group (2) from Group (1) position but will not be shown on Group (2) seniority roster except as hereinafter provided for.

2. They must return to clerical service if there is an opportunity to do so during the ensuing 24 months from the time they are demoted.

3. They will continue to accumulate clerical seniority in the district where they were cut off but will not accumulate any seniority as a Group (2) employee except as provided in Section No. 4.

4. If there is no opportunity to return to clerical service within 24 months they will then lose all clerical seniority standing but will have restored to them their original seniority as Group (2) employee accumulated up to the date they lose clerical seniority, so that they will then rank on the Group (2) seniority list exactly the same as if they had never been promoted.

Thereafter such an employee cannot re-enter clerical service except as a new employee so far as seniority is concerned.

135 Clerks holding Group (1) positions who were promoted from Group (3) positions shall be permitted to return to Group (3) positions in the Department from which promoted when by exercise of seniority they can no longer hold a position in Group (1); provided their return to Group (3) will not displace an employee older in service in that Group. The retention of Group (1) seniority shall be subject to provisions of Rule 15.

Promotion Basis.

Rule 4—Employees covered by these rules shall be in line for promotion. Promotion shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail except, however, that this provision shall not apply to excepted positions or to paragraph (4) of Rule 2.

Note: The word "sufficient" is intended to more clearly establish the right of the senior clerk or employee to

bid in a new position or vacancy where two or more employees have adequate fitness and ability.

Seniority Districts.

Rule 5—Seniority districts are established as follows:

- (1) Ticket Department,
- (2) Mail and Baggage Department,
- (3) Mechanical Department,
- (4) Accounting Department,
- (5) Stores Department,
- (6) Transportation Department,
- (7) All employees of Group (2) of Rule 1 except those covered in seniority district number (8) and (9).
- 136 (8) All employees of Group (3) of Rule 1, also baggage and parcel room employees other than clerks working in the baggage and mail department.
- (9) Janitors and all of Group (3) not covered in seniority district number (8).

Bulletin.

Rule 6—When one or more positions or vacancies are to be filled, bulletin notices showing location, title, hours of service, whether 6 or 7 day positions, and rate of pay will be posted promptly in agreed upon places accessible to all employees affected for a period of five (5) days in the seniority district where the position is located.

Employees within that seniority district may, within the bulletin period, file application with the designated official, sending copy to the District Chairman, for one or more (stating preference) of the positions to be filled irrespective of the rate of pay, and an assignment will be made within five (5) days thereafter; the name of the successful applicant will immediately thereafter be posted for a period of five (5) days where the position was bulletined. A copy of all bulletins and assignments will be sent to the District Chairman.

Employees on other seniority districts may also file application for bulletined positions on any seniority district, and in the event bulletined positions are not filled from applicants within the seniority district where the position is located the applicants from other seniority districts will, if they possess sufficient fitness and ability, be given preference over non-employees.

Note: "Non-employees" mean someone who is not in the service or not covered by the Clerks' Agreement.

137. Temporary Appointment.

Rule 7—Bulletined positions may be filled temporarily pending an assignment, and in event no applications received, may be permanently filled without regard to these rules, but must in every incident be bulletined.

Declining Promotion.

Rule 8—Employees declining promotion or declining to bid for a bulletined position shall not lose their seniority.

Failure to Qualify.

Rule 9—Employees awarded bulletined positions will be allowed thirty (30) days in which to qualify, and fail-

ing, shall retain all their seniority rights, may bid on any bulletined position, but may not displace any regularly assigned employee.

Former Position Vacant.

Rule 10—When an employee bids for and is awarded a permanent position, his former position will be declared vacant and bulletined.

Short or Indefinite Vacancies.

Rule 11—Positions or vacancies of thirty (30) days or less duration, shall be considered temporary, and may be filled without bulletin. If before the expiration of the thirty (30) day period it is found that the position or vacancy will extend beyond the thirty (30) day period the position or vacancy will then be immediately bulletined, and where possible show the probable duration of vacancy.

Long Vacancy.

Rule 12—Positions or vacancies known to be of more than thirty (30) days duration will be bulletined and filled in accordance with these rules.

138

Leave of Absence.

Rule 13—Leave of absence will be granted employees when they can be spared without detriment to the operation of the property, and in case of physical disability and sickness indefinite leave of absence may be granted. If leave of absence extends beyond sixty (60) days the General Chairman will be advised of same.

Employees assigned to temporary positions or duties for a period not exceeding six months will retain their service and seniority standing, and at the conclusion of such assignment will be returned to and take their proper place in the seniority district from which assigned.

Bidding After Absence.

Rule 14—An employee, returning after leave of absence, or when relieved from temporary assignment, and or excepted or official position, may return to former position, provided during such absence it has not been bid in by a senior employee displaced from his former position in the exercise of seniority; or may upon his return or within five (5) days thereafter, exercise seniority rights (subject to provisions of Rule 4) to any position bulletined during such absence. In event employee's former position has been abolished during such absence he may then exercise seniority rights (subject to provisions of Rule 4) over any junior employee, if such right is asserted within thirty (30) days after his return. Employees displaced by his return may exercise their seniority in the same manner and subject to same conditions.

Reducing Forces.

Rule 15—When reducing forces seniority rights shall govern. When forces are increased employees shall be returned to service in the order of their seniority rights, provided this is done within a period of twenty-four (24) months; otherwise seniority standing is forfeited. Employees desiring to avail themselves of this rule must file their addresses in duplicate with the proper official (the officer authorized to bulletin and award positions) at time of reduction, advise

promptly of any change in address and renew address each ninety (90) days. Employees failing to renew their addresses each ninety (90) days or to return to the service within seven (7) days after being notified (by mail or telegram sent to the address last given) or give satisfactory reason for not doing so will be considered out of the service. The official will sign and return to the employee as his receipt one copy of the address as filed.

Employees who have been cut off on account of reduction in force will continue to hold seniority rights, provided any service has been required of them within a twenty-four months' period, regardless of whether the work performed was regular or relief service.

Exercising Seniority.

Rule 16—When the established starting time of a regular position is changed more than one (1) hour for more than six (6) consecutive days, the employee affected may, within ten (10) days thereafter, upon thirty-six (36) hours advance notice exercise their seniority rights to position held by junior employee. Other employees affected may exercise their seniority in the same manner.

Change in Rates.

Rule 17—Change in Rates: Except when change in rates result in negotiations for adjustments of a general character, or adjustments due the position, the changing of the rates of a specific position for a particular reason shall constitute a new position.

Roster.

Rule 18—Seniority rosters of all employees in each seniority district showing name and proper dating will be

140 posted in agreed upon places accessible to all employees affected. The roster will be revised and posted in January and July of each year and will be open to protest for a period of sixty (60) days from date of posting. Upon presentation of proof of error by employee or his representative such error will be corrected. The duly accredited representative of the employees shall be furnished with copy of roster. Names of employees retaining seniority rights under Rule 22 shall be carried on the seniority roster with an asterisk (*) placed before such names to properly designate them.

Transferring.

Rule 19—Employees transferring from one seniority district or roster to another shall rank from date of transfer on seniority district or roster to which transferred except employees who are promoted from Group 2 or 3 as provided in Rule 3 and last paragraph of Rule 6. When a position is transferred from one seniority district or roster to another, the employee affected shall have prior rights to position transferred. If he elects not to follow his position same shall be bulletined in the seniority district from which position is transferred; thereafter the position shall become a part of and be treated the same as any other position in the seniority district or roster to which transferred. Employees transferring to another seniority district or roster under such circumstances will be given seniority dating on the seniority district or roster to which transferred corresponding to date held by them on seniority district or roster from which transferred.

When, for any reason, the Company consolidates two or more offices or departments, employees affected in each of these departments will retain their seniority and continue to accumulate seniority in the department transferred to.

141

Position Abolished.

Rule 20—Employees whose positions are abolished may exercise their seniority rights over junior employees in their seniority districts; but will be required to avail themselves of this rule within thirty (30) days. Other employees affected may exercise their seniority in the same manner.

Re-entering the Service.

Rule 21—Employees voluntarily leaving the service will, if they re-enter, be considered new employees.

Excepted Positions.

Rule 22—Employees now filling or promoted to excepted or official position shall retain all their rights and continue to accumulate seniority in the district from which promoted.

When excepted or official positions are filled by other than employees covered by these rules no seniority rights shall be established by such employment.

Validating Records.

Rule 23—The applications of new employees shall be approved or disapproved within sixty (60) days after the applicant begins work, unless a longer time is mutually agreed to by the management and the representative of employees.

In event of applicant giving false information, this rule shall not apply.

Discipline and Grievances Investigation.

Rule 24—An employee who has been in the service more than sixty (60) days or whose application has been formally approved shall not be disciplined or dismissed without investigation, at which investigation he may be represented by an employee of his choice or duly accredited representatives. He may, however, be held out of service pending such investigation. He shall, upon request, have not to exceed five (5) days advance notice of such investigation and be apprised in writing of the charges against him. The investigation shall be held within ten (10) days of the date when charged with the offense or held from service. A decision will be rendered within 10 days after the completion of investigation.

Hearing.

Rule 25—An employee dissatisfied with the decision shall have a fair and impartial hearing before the next proper officer provided written request is made to such officer and a copy furnished to the agent or officer whose decision is appealed, within seven (7) days of the date of the advice of the decision. Hearing shall be granted within seven (7) days thereafter, and decision rendered within seven (7) days after completion of the hearing.

Appeal.

Rule 26—If an appeal is taken from this hearing it must be filed with the next higher official and a copy furnished the official whose decision is appealed within ten (10) days after the date of the decision.

The hearing of the appeal shall be held within (10) days, and a decision rendered within five (5) days after completion of hearing.

Grievances.

Rule 27—An employee who considers himself otherwise unjustly treated shall have the same right of hearing and appeal as provided above if written request is made to his immediate superior within seven (7) days of the cause of complaint.

143

Representation.

Rule 28—At the hearing or on the appeal, the employee may be assisted by one or more duly accredited representatives.

Right of Appeal.

Rule 29—The right of appeal by employees or their representatives in the regular order of succession and in the manner prescribed, up to and inclusive of the highest official designated by the railroad to whom appeal may be made, is hereby established.

Advice of Cause.

Rule 30—An employee, on request, will be given a letter stating the cause of discipline. A copy of all statements made a matter of record at the investigation or on the appeal will be furnished on request to the employee or his representative.

Exoneration.

Rule 31—If the final decision decrees that charges against the employee were not sustained, the record shall

be cleared of the charge; if suspended or dismissed, the employee shall be reinstated and paid for all time lost.

Date of Suspension.

Rule 32—If an employee is suspended, the suspension shall date from the time he was taken out of the service.

Transportation.

Rule 33—Committees of employees will be granted transportation when possible to obtain, and necessary leave of absence for investigation, consideration and adjustment of grievances.

144

Organized Membership.

Rule 34—No discrimination will be made in the employment, retention or conditions of employment of employees because of membership or non-membership in labor organization.

Pending Decision.

Rule 35—Prior to the assertion of grievances as herein provided, and while questions of grievances are pending, there will be neither a shut-down by the employer nor a suspension of work by the employees.

Hours of Services and Meal-Period.

Rule 36—Except as otherwise provided in these rules, eight (8) consecutive hours' work, exclusive of the meal period, shall constitute a day's work.

Intermittent Service.

Rule 37—Where service is intermittent, eight (8) hours' actual time on duty within a spread of twelve (12) hours shall constitute a day's work. Employees filling such positions shall be paid overtime for all time actually on duty or held for duty in excess of eight (8) hours from the time required to report for duty to the time of release within twelve (12) consecutive hours, computed continuously from the time first required to report until final release. Time shall be counted as continuous service in all cases where the interval of release from duty does not exceed one (1) hour.

Exceptions to the foregoing paragraph shall be made for individual positions when agreed to between the management and duly accredited representatives of the employees. For such excepted positions the foregoing paragraph shall not apply.

145 This rule shall not be construed as authorizing the working of split tricks where continuous service is required.

Intermittent service is understood to mean service of a character where during the hours of assignment there is no work to be performed for periods of more than one (1) hour's duration and service of the employees cannot be otherwise utilized.

Employees covered by this rule will be paid not less than eight (8) hours within a spread of twelve (12) consecutive hours.

Reporting and Not Used.

Rule 38—Employees required to report for work at regular starting time, and prevented from performing

service by conditions beyond control of the Company, will be paid for actual time held with a minimum of two (2) hours.

If worked any portion of the day, under such conditions, up to a total of (4) hours, a minimum of four (4) hours shall be allowed; if worked in excess of four (4) hours, a minimum of eight (8) hours shall apply.

All time under this rule shall be at pro rata.

This rule does not apply to employees who are engaged to take care of fluctuating or temporarily increased work which cannot be handled by the regular forces; nor shall it apply to regular employees who lay off of their own accord before completion of the day's work.

Length of Meal Period.

Rule 39—Unless agreed to by the majority of employees in a department or subdivision thereof, the meal period shall not be less than thirty (30) minutes nor more than one (1) hour.

146 Continuous Work Without Meal Period.

Rule 40—For regular operations requiring continuous hours, eight (8) consecutive hours without meal period may be assigned as constituting a day's work, in which case not to exceed twenty (20) minutes shall be allowed in which to eat, without deduction in pay, when the nature of the work permits. When work is continuous, requiring some one to relieve the employee for meal period, Rule 39 will not apply.

Meal Period.

Rule 41—When a meal period is allowed, it will be between the ending of the fourth hour and beginning of

the seventh hour after starting work, unless otherwise agreed upon by the employees and the employer.

Working During Meal Period.

Rule 42—If the meal period is not afforded within the allowed or agreed time limit and is worked, the meal period shall be paid for at the overtime rate and twenty (20) minutes, with pay, in which to eat shall be afforded at the first opportunity.

Changing Starting Time.

Rule 43—Regular assignments shall have a fixed starting time and the regular starting time shall not be changed without at least thirty-six (36) hours notice to the employees affected. (Except seniority district (8).)

Three Shift Positions.

Rule 44—Where three consecutive shifts are worked covering the 24-hour period, no shift will have a starting time after 12 o'clock midnight and before 5 A. M.

147

Overtime and Calls.

Overtime.

Rule 45—Except as otherwise provided in these rules, time in excess of eight (8) hours, exclusive of meal period, on any day, will be considered overtime and paid on the actual minute basis at the rate of time and one-half time. When necessary to work overtime the employee occupying the position on which overtime work is necessary will be given preference to such overtime work.

Notified or Called.

Rule 46—Except as provided in Rule 47, employees notified or called to perform work not continuous with, before or after the regular work period, or on Sundays and specified holidays, shall be allowed a minimum of three hours for two (2) hours work or less, and if held on duty in excess of two (2) hours, time and one-half time will be allowed on the minute basis.

Full Day Period.

Rule 47—Except as otherwise provided in these rules, time work on Sundays and the following holidays—namely: New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas (provided when any of the above holidays fall on Sunday, the day observed by the State, Nation, or by proclamation shall be considered the holiday) shall be paid at the pro rata hourly rate when the entire number of hours constituting the regular week-day assignment are worked.

Rule 48—Employees who have completed their regular tour of duty and have been released, required to return for further service, may, if the conditions justify, be compensated as if on continuous duty.

148 . Rule 49—Employees covered by Groups (1) and (2) Rule 1, heretofore paid on a monthly, weekly or hourly basis shall be paid on a daily basis. The conversion to a daily basis of monthly, weekly or hourly rates shall not operate to establish a rate of pay either more or less favorable than is now in effect.

Nothing herein shall be construed to permit the reduction of days for the employees covered by this rule

below six per week, excepting that this number may be reduced in a week in which holidays occur by the number of such holidays.

Absorbing Overtime.

Rule 50—Employees will not be required to suspend work during regular hours to absorb overtime.

Authorizing Overtime.

Rule 51—No overtime hours will be worked except by direction of proper authority, except in cases of emergency where advance authority is not obtainable.

Notified When Disallowed.

Rule 52—When time is claimed in writing and such claim is disallowed, the employees making the claim shall be notified in writing and reason for non-allowance given.

Rating Position.

Rule 53—Positions (not employees) shall be rated and the transfer of rates from one position to another shall not be permitted.

Preservation of Rates.

149 Rule 54—Employees temporarily or permanently assigned to higher rated positions shall receive the higher rates while occupying such positions; employees temporarily assigned to lower rated positions shall not have their rates reduced.

A "temporary assignment" contemplates the fulfillment of the duties and responsibilities of the position during

the time occupied, whether the regular occupant of the position is absent or whether the temporary assignee does the work irrespective of the presence of the regular employee. Assisting a higher rated employee due to a temporary increase in the volume of work does not constitute a temporary assignment.

Rates.

Rule 55—Established positions shall not be discontinued and new ones created under a different title covering relatively the same class of work for the purpose of reducing the rate of pay or evading the application of these rules.

Women.

Rule 56—The pay for women employees for the same class of work shall be the same as that of men, and their working conditions must be healthful and fitted to their needs. The laws enacted for the government of their employment must be observed.

New Positions.

Rule 57—The wages for new positions shall be in conformity with the wages for positions of similar kind or class in the seniority district where created.

Attending Court.

Rule 58—Employees taken away from their regular assigned duties at the request of the Management, to attend Court or to appear as witnesses for the
150 Company, will be furnished transportation and will be allowed compensation equal to what would have been earned had such interruption not taken

place, and, in addition, necessary actual expenses while away from headquarters. Any fee or mileage accruing will be assigned to the Company.

General.

Posting Notices.

Rule 59—At points or in departments where 25 or more employees covered by this schedule are employed, suitable provisions will be made for posting notices of interest to the employees.

Duly Accredited Representatives.

Rule 60—Where the term "duly accredited representatives" appears in this agreement it shall be understood to mean the regular constituted committee representing the class of employees covered by this agreement.

Incapacitated Employees.

Rule 61—Efforts will be made to furnish employment (suited to their capacity) to employees who have become physically unable to continue in service in their present positions.

Machines, Furnished.

Rule 62—Typewriters and other office equipment devices will be furnished by the carriers at offices where the management requires their use.

Bond Premiums.

Rule 63.—Employees shall not be required to pay premiums on bonds required by the carrier in handling its business.

Free Transportation.

Rule 64—Employees covered by this agreement and those dependent upon them for support will be given the same consideration granting free transportation as is granted other employees in service.

151 . General committees representing employees covered by this agreement will be granted the same consideration as is granted general committees representing employees in other branches of the service.

Service Letters.

Rule 65—Employees whose applications are approved and who have been in the service sixty (60) days or longer, will, upon request, if they leave the service of the Company, be furnished with service letter showing length of time in service, capacity in which employed, and cause for leaving.

Annual Vacations.

Rule 66—Employees who on January 1st have been in continuous service of the carrier one year or more, will be granted annual vacations with pay provided the work is kept up by other employees and there is no expense to the carrier involved in granting the vacations.

Heads of the departments when granting vacations will give the employees who on January 1st have been in the service continuously, one year and less than two years, one week or six working days; those in the service two years and less than three years, ten days or nine working days; those in the service three years and over, two weeks or twelve working days.

Effective Date

Rule 67—This agreement shall be effective February 1st, 1937, and shall continue in effect until it is changed as provided herein or under the provision of the Railway Labor Act as amended June 21, 1934.

152 Should either of the parties to this agreement desire to revise or modify these rules, 30 days' written advance notice, containing the proposed changes, shall be given and conference shall be held immediately on the expiration of said notice unless another date is mutually agreed upon.

J. L. WILKES,
President-General Manager,
Jacksonville Terminal
Company.

L. L. WOOTEN,
General Chairman, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

153 TRANSCRIPT OF PROCEEDINGS BEFORE
CURTIS L. WALLER, UNITED STATES
DISTRICT JUDGE, OCTOBER 17, 1940, AT
JACKSONVILLE, FLORIDA.

The case was called and the following proceedings had:

By Mr. Hartridge:

This case comes up pursuant to notice given by the Honorable Louie W. Strum, Judge of the District Court, which notice is as follows:

"September 17, 1940:

Messrs.:

Frank F. Engle,
Attorney for Plaintiff.

Julian Hartridge,
Attorney for Defendant,
Jacksonville, Florida.

Gentlemen:

Re: Williams, et al, vs. Jacksonville Terminal
Company, #237-J. Civil.

The motion for summary judgment filed in the above styled cause will be heard and disposed of by the Court on Thursday, October 17, 1940, at 9:30 o'clock a. m.

In the event said motion for summary judgment be denied, the Court will proceed to a trial of the cause on its merits, and all parties should be ready to present said cause on its merits forthwith, in the event the motion for summary judgment be denied.

Yours very truly,

(S.) LOUIE W. STRUM,

(Louie W. Strum)

U. S. District Judge."

The pleadings were outlined by Mr. Hartridge together with the issue presented by the pleadings.

154 The Court:

Let this be shown in the record:

Plaintiff offered in evidence certain depositions and exhibits thereto, in support of the plaintiff's motion for summary judgment. The depositions were ordered filed in evidence, subject to the right of the defendant to object later to the relevancy or competency.

Mr. Hartridge:

Counsel for the defendant objects to plaintiff's Exhibits 1 to 17 and 19 to 32, inclusive, being received in evidence on the ground that said exhibits and the contents thereof are immaterial and irrelevant, therefore incompetent by reason of the fact that this is an action under Section 16-B of the Fair Labor Standards Act, based upon the claim that the defendant has not paid to the plaintiff the full amount of the minimum wage prescribed by law.

That the contents of said exhibits relate wholly to negotiations and discussions leading up to a collective bargaining agreement, effective June 16, 1939. To be effective June 16, 1939, between this defendant and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; that said collective agreement has no provision relating to or bearing upon the legal right of the defendant, under the Fair Labor Standards Act, to pay its employees wages under the so-called accounting and guarantee plan, an issue in this litigation, and no reference to or bearing upon any of the other issues here involved.

That the right of the defendant, under the Fair Labor Standards Act to pay its employees in the manner here contested, does not rest upon said contract, or any contract involved in or arising out of said negotiations, so far as respect the cause of action under Section 16-B of said Act herein sued upon by the plaintiff, but
 155 rests instead, upon the legal nature and status of the tips paid to Red Caps, and the incident

of the employer-employee relationship between the plaintiff as the employee and the defendant as their employer.

That the monies paid to plaintiff's Red Caps as tips, were compensation for services rendered by them as employees of the defendant, and lawfully belonged to the defendant by virtue of said fact, and of said employer-employee relationship between plaintiffs and defendant and not by virtue of any contract between plaintiffs and the defendant, arising out of, or in the course of said negotiations.

That the discussions and negotiations which form the subject matter of said exhibits, have no reference to or bearing upon the legal nature and status of said tips, or the incidents of said employer-employee relationship and are, therefore, irrelevant and immaterial to the issue here presented, which is, whether or not, under the method of wage payment adopted and practiced by this defendant, the plaintiffs received the full amount of the minimum wage prescribed by the said Fair Labor Standards Act.

The plaintiff attaches to the depositions the proceedings or findings and recommendations of the presiding officer in a hearing on the proposed amendment of Paragraph 516, relating to records to be kept by employers, and the regulations they are issued under, Section 117, of the Fair Labor Standard Act, which is Exhibit 33.

This was a hearing held before Gustav Peck, designated by an order of the Administrator of the Wage and Hour Division, to take testimony and hear matters with respect to said rights, in which he recites practices of which there was testimony and which the testimony said was in vogue in other companies than the Jackson-

ville Terminal Company, and not a part of this case, and the recommendation by this Examiner, made after the hearing of such testimony.

156 The defendant objects to the introduction of Exhibit thirty-three, same being the findings and recommendations of presiding officer, Gustav Peck, of the Wage and Hour Division of the United States Department of Labor, for the following reasons, to-wit:

1. The same is an investigation made by the Department of Labor solely as to accounting methods.

2. Said exhibit, nor any part thereof, has any bearing on any of the issues settled by the pleadings herein.

3. The same has no legal or probative force as to any of the issues involved herein.

Oral argument having been submitted to the Court by Mr. Hartridge the following further proceedings were had:

The Court:

Do you have anything further? Do you have any further objection?

Mr. Hartridge:

No, sir, that is all I have.

Mr. L'Engle:

Do I understand, and so the Court will understand at this time, as to the objection that you placed on the record in taking the depositions, or as to the materiality of this paper, or as to the authenticity of it, on the other record, there is still a consent to that?

Mr. Hartridge:

There is a consent that this is a correct copy of what it purports to be. There is objection, on the ground it is incompetent.

The Court:

You have reference to the findings of the Department of Labor?

Mr. Hartridge:

Of Gustav Peck.

The Court:

The Court will reserve its ruling.

157

Therefore, the Court heard the oral argument of counsel for the respective parties.

It was thereupon stipulated that in the event plaintiffs prevail the sum of One Thousand Dollars (\$1000.00) would be a reasonable fee to be allowed plaintiffs for their attorneys as provided by the Act.

There being no further matters to present the hearing adjourned.

We, the undersigned attorneys of record for the respective parties hereto, do hereby stipulate and agree that the foregoing is a true and correct transcript of the proceedings before Curtis L. Waller, United States District Judge at Jacksonville, Florida, on October 17th, 1940.

(S.) FRANK F. L'ENGLE,

(Frank F. L'Engle)

(S.) JULIAN HARTRIDGE,

(Julian Hartridge)

158 (ORDER DATED OCTOBER 21st, 1940, SUSTAINING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.)

This is a proceeding by and on behalf of the red caps of the Jacksonville Terminal Station to recover amounts alleged to be due as wages under the Fair Labor Standards Act, together with liquidated damages and attorney's fee.

Both sides to this controversy have moved for summary judgment on the pleadings, depositions, affidavits, and stipulations.

The material facts are not in dispute. A summary judgment is, therefore, appropriate.

The defendant, the Terminal Company, hereinafter referred to as "the defendant", admits that it is engaged in interstate commerce, and that the plaintiffs are its employees, and that they are likewise engaged in interstate commerce, by reason whereof the plaintiffs are entitled to be paid the minimum wages provided by Section 6 of said Fair Labor Standards Act, which wages the defendant contends the plaintiffs have received by way of tips or sums paid by passengers in its terminal station to red caps for handling the luggage, etc., of said passengers.

159 The plaintiffs contend that the sums received from passengers by way of tips are gifts or gratuities belonging to the plaintiffs, and are not to be considered as "wages", within the meaning of the Fair Labor Standards Act. The sole question presented for

determination is whether or not the sums so received by said red caps as tips should be considered or construed as "wages". If said tips are to be construed as wages under the Fair Labor Standards Act, then the plaintiffs have received in excess of the minimum wage provided by the Act and, therefore, have no right of action.

It is appropriate that a history of the relationships between the red caps and the defendant should be reviewed. It appears that for more than a dozen years the plaintiffs, commonly called "red caps", performed services in the terminal station of the defendant in carrying luggage and personal effects of passengers boarding and alighting from trains at said terminal station; that the sole compensation received by the red caps came from the sums paid by such passengers to said red caps in consideration of the services rendered the passengers in handling their luggage; that no wages or other compensation was paid by the terminal company to said red caps; that the red caps, however, were required to observe certain hours, rules, and regulations imposed by the terminal company for the infraction of which the red cap would be denied the right to continue so to work, which denial of right so to work might be temporary or permanent in nature; that the Terminal Company furnished the red caps with uniforms; that no part of the sums paid by the passengers to the red caps was ever paid over to the Terminal Company; that whatever the red cap made he kept; that the red cap had no right to fix a definite charge for any service but was expected to accept whatever the passenger saw fit to give him; that the Terminal Company, prior to

1938, considered the red cap as a licensee or independent contractor, obliged to conform to established rules and regulations of the station; that in 1938 the Interstate Commerce Commission classi-

fied or characterized such red caps as employees of the Terminal Company as distinguished from independent contractors or licensees; that this ruling of the Interstate Commerce Commission was handed down less than thirty days before the effective date of the Fair Labor Standards Act.

The Terminal Company, pursuant to the above ruling of the Interstate Commerce Commission declaring red caps to be employees, and in contemplation of the Fair Labor Standards Act, served the following notice on the red caps:

"In view of the requirements of the Fair Labor Standards Act, effective October 24, 1938, and in consideration of your hereafter engaging in the handling of hand baggage and travelling effects of passengers or otherwise assisting them at or about stations or destinations, it will be necessary that you report daily to the undersigned the amounts received by you as tips or remuneration for such services.

"The carrier hereby guarantees to each person continuing such service after October 24, 1938, compensation which, together with and including the sums of money received as above provided, will not be less than the minimum wage provided by law.

"You are privileged to retain subject to their being credited on such guarantee all such tips or remuneration received by you except such portion thereof as may be required of you by the undersigned for taxes of any character imposed upon you by law and collectible by the undersigned.

"All the matters above referred to are subject to the right of the carrier to determine from time to time the

number and identity of persons to be permitted to engage in said work and the hours to be devoted thereto to establish rules and regulations relating to the manner, method and place of rendition of such service, and the accounting required."

Said notice at least had the effect of advising the plaintiffs of the construction which the defendant proposed to place on the compensation received by the red caps by way of so-called tips. It does not appear that the red caps acquiesced in or consented to the plan set

forth in said notice, although they purported to
161 comply therewith in the matter of reporting the amount received by them as tips. However, it

appears that the plaintiffs, through their representative, contemplated further negotiations and a later determination of the question either by the Administrator of the Wages and Hours Act or in some judicial proceeding. Neither side contends that the notice, negotiations, and discussions amounted to a contract, and both sides agree that parties could not contract themselves from under the provisions of said Fair Labor Standards Act.

There is no contract; there is no estoppel; but the said notice and correspondence relative to the subject were admitted in evidence solely for whatever light the same might shed on the construction that the parties themselves might have placed on the question of whether these tips were considered as wages or compensation for services rendered by the plaintiffs.

Whenever the amount collected by the red cap from passengers was less than the minimum wage prescribed by Section 6, Fair Labor Standards Act, the defendant paid the red cap the difference, so that, from both sources, plaintiffs have received an amount not less than the minimum called for by said Act.

Conclusions of Law

The sole substantial question to be determined by the Court is whether or not the sums paid by the passengers to the red caps, either as compensation, as tips, or as gratuities, can be construed to be wages within the intent and purpose of the Federal Wages and Hours Law. Paragraph (m) of Section 203, Title 29, U. S. C. A. (Fair Labor Standards Act of 1938), is as follows:

"(m) 'Wage' paid by any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employee."

162 In other words, "wages paid to an employee" may include board, lodging, and other facilities, if such other facilities are customarily furnished by the employer to his employee. The reasonable cost of board, lodging, and the like, may be determined by the Administrator; that is to say, that the Administrator has the right, probably the duty, to determine whether or not the cost of the things charged to the employee as wages is reasonable. The Act does not prohibit the compensation of a wage earner with something other than money paid out of the pocket of an employer, but whatever is charged as a wage must be reasonable. If, however, the "other facilities" happen to be money, there is no "reasonable cost" to be determined by the Administrator. For example, if Jones pays his truck driver fifteen cents an hour and permits him to use his truck to haul for other people, whereby the truck driver makes an additional fifteen cents an hour, there would be nothing for the Administrator to determine as to the reasonable cost

of their arrangement. The main point is, does the truck driver receive the wages required by the Act, and if he received a portion from Jones as fixed wages and the balance from instrumentalities furnished by Jones under circumstances that the matter of reasonable cost was not involved, it would seem there was nothing for the Administrator to determine. It would also seem that the letter of the Act itself contemplates the use of facilities in the matter of payment of wages.

In the instant case it has not been disputed that the Station and the passengers were facilities furnished by the employer without which there would neither be employee nor wages.

The terminal station, with all its facilities, belonged to the defendant. It had the legal right to deny the use of those facilities to persons who would use it as a place of business. It likewise had the legal right to extend a privilege to anyone it saw fit who would observe appropriate rules and regulations and otherwise observe the conditions under which the privilege or license was granted. It had the legal right to exact payment from concessionaires using its facilities for profit, and to require the observance of its known and reasonable regulations; or it had the legal right to waive the payment of a consideration.

The services performed by plaintiffs were for the passengers—not the Terminal Company. Their compensation was paid by the passengers—not the Terminal Company. The compensation so paid went to the red cap—not the Terminal Company. Neither the Railroad Company nor the Terminal Company was under any obligation, contractual or otherwise, to carry the passenger's luggage from the train to the taxi, or elsewhere. The

passenger merely accepted the red cap's proffered service, and from immemorial custom there perhaps arose an implication that the server would be compensated,—the recipient of the service being the sole judge of the amount of such compensation. The amount of the red cap's earnings would doubtless generally depend on good fortune, good manners, good customers, the number of passengers, the weight and number of parcels handled, the alacrity with which the red cap bestirred himself, and other factors partly within his own control, but entirely beyond the control of the Terminal Company, which latter merely furnished him the opportunity and the facility wherein and wherewith to ply his trade. Because of the foregoing course of dealing, I reject the theory that the plaintiffs were wage-earning employees within the intent and purposes of the Fair Labor Standards Act. They were working for themselves and the passengers whom they served and whose orders they obeyed in that service.

However, if we concede that they were employees and within the Act, we would still find that, in cash paid directly and through the facilities furnished by the employer, plaintiffs have been paid, in the aggregate, considerably in excess of the minimum wages required by said Act. It would seem immaterial whether the employee was paid by the employer directly or whether he was paid through an instrumentality or facility set up for his use and benefit by the employer. The question is did he receive, either directly or indirectly, for his services a sum not less than the minimum required by the Act. It is not a question of who paid him, but of how much he was paid.

It must not be overlooked that the Terminal Company had the legal right, if it had chosen, to have fixed and collected a fee for the service so rendered, and to have

received the same, but as an incentive to better service, it allowed the red cap to keep all he collected. If he collected more than the legal minimum wage, it was his good fortune—a reward for his hustling—but if he failed to collect the minimum provided by the Act the defendant paid him the difference between the amount collected and the statutory minimum. The red cap stood to win. He could not lose. The company stood only to lose. It could never win. The red cap could often receive for his services more than the minimum wage but never less. Since, therefore, the red cap was compensated by the transfer to him of a legal right of the company to charge and collect fees for these services, the legal effect or result is the same, as far as the red cap is concerned, as if the company had collected these fees and paid the red cap directly instead of indirectly.

The intent of an act is the essence thereof, and the intent thereof should be given effect as against the mere words of an act when the mere words, construed alone, would produce legislative or judicial brigandage. The Court believes that the wording of the Act in defining "wages" provides that things other than the direct payment of money can be used in the payment of wages. The plaintiffs here were paid in money, but in an indirect way—through facilities afforded the plaintiffs by defendant. No question of determination of "reasonable cost" is involved. They were compensated in money which the defendant had the legal right to collect and to keep if it rendered the services through its employees as contended. There can be no substantial difference between compensation for services rendered and wages for services rendered.

service performed: It never intended that Section 6 of the Act should do more than that. In the present case the plaintiffs, as a group, received out of their relationship, or employment, some \$3000.00 in excess of the minimum wage required by law. They here seek to be paid again all sums which they have received out of their relationship, or employment, plus an equal amount as liquidated damages, plus attorney's fee. I subscribe wholeheartedly to the real purpose of the Act as I conceive it, but I cannot ascribe to Congress the superlative folly of intending that an employee, under the circumstances of this case, wherein no element of wilfulness is involved, should recover the minimum wage thrice multiplied.

It is, therefore, Ordered that:

The motion for summary judgment for the defendant is sustained. The motion of plaintiffs for a summary judgment in their favor is denied. The complaint is hereby dismissed, and the plaintiffs shall take nothing by their suit. The costs, to be taxed by the Clerk, are adjudged against the plaintiffs.

Done and Ordered this 21st day of October, A. D. 1940.

CURTIS L. WALLER,
U. S. District Judge.

MOTION FOR NEW TRIAL.

Comes now the plaintiffs herein and move this Honorable Court for a new trial on the following grounds:

1. The Court erred in its order of October 21, 1940:
2. Said order was contrary to law.
3. Said order was contrary to the evidence.
4. Said order was contrary to the law and the evidence.
5. The Court erred in overlooking the evidence in the hearing before Gustav Peck, Exhibit 33, showing that Terminal Company practices under the Accounting and Guarantee Plan resulted in Red Caps reporting through fear the minimum tips regardless of whether earned.
6. The Court overlooked in said Exhibit 33 the finding that under said Accounting and Guarantee Plan, the Terminal Company at first required that Red Caps report, as hours, only the time actually spent in carrying bags, eliminating the solicitation time.
7. The plaintiff proffered testimony to show that by practices of this defendant, the plaintiffs or some of them, through ignorance or fear of disciplinary action, reported as earned sufficient tips to amount to the minimum, despite the fact that they were not earned.
8. The testimony shows that the plaintiffs and the defendant, prior to action of Wages and Hours Administration by the Administrator in June, 1938, required the men to report as hours of service only the minutes actually consumed in carrying bags.

167 9. The Court overlooked the contract of the parties on all working conditions save wages and hours to keep the matter in status quo.

10. The Court overlooked the protest of the men at all times and the refusal of the men to accede to the appropriation of their tips.

11. The Court overlooked the fact that the Terminal Company has never paid these minimum wages at one time and stands to be unjustly enriched by \$32,000.00 of the Red Caps personal property.

12. That the construction placed by the Court of the Fair Labor Standards Act is that such law places a veiling on pages and not a minimum wage.

13. That the fact that the Red Caps, by their prior employment, made more than the Fair Labor Standards Act guarantees is immaterial to the consideration of the question of whether or not the minimum wages provisions of the Act has been complied with.

14. That the Court overlooked the fact that it was stipulated by counsel for respective parties that these Red Caps were employees of the Terminal Company under the terms of the Fair Labor Standards Act and the contention of the Red Caps prior to the effective date of the Act was that the tips belonged to them and not the Terminal Company, and requested the Company to pay them the minimum wages.

15. The fact that the parties continued in the relation of employee and employer during the time from the effective date of the Act to July 1st, 1940, should be considered along with the stipulation of counsel, the record and the acquiescence by the Terminal Company by their continued

acceptance of the fact that the ownership of tips in relation to minimum wage was a matter for judicial determination.

168 16. The present manner of payment under the terms of the Fair Labor Standards Act beginning July 1st, 1940, wherein the Terminal Company is now paying the \$2.40 now required by the Act and requiring the Red Caps to sell checks for ten cents apiece on baggage handled by them is indicative and controlling in construing how the Terminal Company considered the question of tips.

FRANK F. L'ENGLE,
Attorney for Plaintiffs.

PROOF OF SERVICE OF COPY.

I, Julian Hartridge, counsel of record for defendant in the above entitled cause, hereby acknowledge receipt of copy of Motion for New Trial.

Jacksonville, Florida, October 30, 1940.

JULIAN HARTRIDGE,
Attorney for Defendant.

169 (ORDER DENYING MOTION FOR NEW TRIAL.)

The motion of the plaintiffs for a new trial having been, by consent of counsel, submitted to the Court without argument and the Court having considered the same is of the opinion that the said motion should be, and the same is hereby overruled.

Done and Ordered this 6th day of November, A. D. 1940.

CURTIS L. WALLER,
U. S. District Judge.

170

NOTICE OF APPEAL.

In the District Court of the United States for the Southern
District of Florida, Jacksonville Division, 237-J Civil.

C. L. Williams, Individually and as duly appointed and
authorized agent and representative for Herbert Aiken,
et al., Plaintiffs,

vs.

Jacksonville Terminal Company, a corporation, Defendant.

Notice is hereby given that C. L. Williams, et al., entered
in the above styled and numbered cause is hereby appealed
to the Circuit Court of Appeals of the United States for
the Fifth Circuit from the final judgment entered in this
action on October 21, A. D. 1940, and order denying motion
for new trial entered November 6th A. D. 1940.

(S.) FRANK F. L'ENGLE,

(Frank F. L'Engle)

Attorney for C. L. Williams,
et al., Plaintiffs.

525 Barnett Nat'l. Bank Bldg.,
Jacksonville, Florida.

Received copy of foregoing notice of appeal this 23rd
day of November, 1940 at Jacksonville, Florida.

(S.) JULIAN HARTRIDGE,

(Julian Hartridge)

Attorney for Jacksonville
Terminal Company, a
corporation, Defendant.

304. Bisbee Bldg.,
Jacksonville, Florida.

171

APPEAL BOND.

(Title Omitted.)

Know All Men By These Presents: Whereas in the above entitled cause in the District Court of the United States for the Southern District of Florida, Jacksonville Division, at a regular term of Court to-wit: on or about the 6th day of November, A. D. 1940, in a suit therein pending wherein C. L. Williams, Individually and duly appointed and authorized agent and representative for Herbert Aiken and others were Plaintiffs and Jacksonville Terminal Company, a corporation was defendant did enter its Final Order or Judgment denying the Motion for Summary Judgment for the Plaintiffs and did in said Order sustain the Motion the Motion for Summary Judgment of the Defendant and dismiss the Complaint of the Plaintiffs and assess the cost of said cause against the Plaintiffs, from which Final Order or Judgment, C. L. Williams, individually and as duly appointed and authorized agent and representative for Herbert Aiken and others, each plaintiffs, desires to take an appeal to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana:

172

Now therefore, we, C. L. Williams individually and as duly appointed and authorized agent and representative for Herbert Aiken and others, as principal and Fidelity and Deposit Company of Maryland, a corporation, as surety, acknowledge ourselves bound to pay to Jacksonville Terminal Company, a corporation the sum of Two Hundred Fifty Dollars (\$250.00) condition, that the plaintiffs shall prosecute their appeal to final effect and shall pay the cost on appeal if their said appeal is dismissed, then the above obligation to be void; else to remain in full force and virtue.

Wherefore, we have hereunto set our hands this 25th day of November, A. D. 1940.

C. L. WILLIAMS,
(C. L. Williams)

(Seal)

Individually and as duly appointed and authorized agent for Herbert Aiken, et al.

FIDELITY & DEPOSIT COMPANY OF MARYLAND.

By JOHN S. KENNEDY,
Attorney in Fact.

(Seal)

173

~~DIRECTIONS~~ TO CLERK.

(Title Omitted.)

The Clerk of the Court will please forward the transcript of record herein to the Clerk of the Circuit Court of Appeals for the Fifth Circuit at New Orleans, the said transcript of the record to include the following papers.

1. Complaint, omitting therefrom the Bill of Particulars.
2. Summons.
3. Answer, omitting from the Bill of Particulars attached thereto, the re-capitulation and the Bill of Particulars for the following named plaintiffs: Edward Kittles; Henry Floson; Fleming Williams, Jr.; Henry Perry; Charles L. Williams; John W. Speights; Clarence Davis; Charles Brooks; Silas W. Owens; Vandy Blake; Andrew Lang; William Petty; Willie Anderson; and substituting therefor the re-capitulation and the Bill of Particulars as to each of the foregoing named plaintiffs attached to the Stipulation filed October 11th 1940.

4. Defendants Motion for Summary Judgment and Notice of Motion and supporting affidavit of John L. Wilkes.

5. Stipulation, filed October 7th, 1940.

6. Plaintiff's Motion for Summary Judgment and Notice.

174 7. Stipulation filed October 11th, 1940.

8. Depositions and Exhibits before Raleigh Dowling, and R. W. Pattison, Notaries Public and offered in evidence at the hearing on Motions for Summary Judgment of both parties before Curtis L. Waller, United States District Judge at Jacksonville, Florida, October 17th, 1940.

9. Transcript of Proceedings before his Honor, Curtis L. Waller, United States District Judge, October 17th, 1940, as agreed upon by counsel for the parties thereto.

10. Order dated October 21st, 1940, sustaining defendant's Motion for Summary Judgment; and denying plaintiff's Motion for Summary Judgment.

11. Motion for New Trial.

12. Proof of service of Copy of Motion for New Trial.

13. Order denying Motion for New Trial.

14. Notice of Appeal.

15. Appeal Bond.

16. Stipulation for Preparation of Transcript of Record, attached hereto.

17. Directions to Clerk.

(S.) FRANK F. L'ENGLE,

(Frank F. L'Engle)

Attorney for Appellants.

525 Barnett Nat'l. Bank Bldg.,
Jacksonville, Florida.

Received a copy of the foregoing Directions to Clerk
this 29th day of November, A. D. 1940.

(S.) JULIAN HARTRIDGE,

(Julian Hartridge)

Attorney for Defendants.

304 Bisbee Bldg.,
Jacksonville, Florida.

175 Counsel for defendant has no additional directions to the Clerk and consents that the Clerk may forthwith proceed with the record under the directions of plaintiff, and Counsel for the respective parties both agree that the above record includes all of the proceedings in the action.

(S.) JULIAN HARTRIDGE,

(Julian Hartridge)

Attorney for defendant.

304 Bisbee Bldg.,
Jacksonville, Florida.

(S.) FRANK F. L'ENGLE,

(Frank F. L'Engle)

Attorney for plaintiffs.

525 Barnett Nat'l. Bank Bldg.,
Jacksonville, Florida.

176 United States of America,
Southern District of Florida, ss.

I, EDWIN R. WILLIAMS, Clerk of the United States District Court in and for the Southern District of Florida, and as such the legal custodian of the records and files of said Court, do hereby certify that the foregoing pages numbered from one to one hundred seventy-five, inclusive, contain a correct transcript of the record of the judgment in the case of C. L. Williams, Individually and as duly appointed and authorized agent and representative for Herbert Aiken, et al., Plaintiffs, against Jacksonville Terminal Company, a corporation, Defendant, and a true copy of all such papers and proceedings in said cause, as appear upon the records and files of my office, that have been directed to be included in said transcript by the written demands of the said parties.

In Witness whereof I hereunto set my hand and affix the seal of said Court at Jacksonville, Florida, this 10th day of December, A. D. 1940.

EDWIN R. WILLIAMS,
(Edwin R. Williams)
Clerk.

(Seal)

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of February 5th, 1941

No. 9754

C. L. WILLIAMS, Individually and as Duly Appointed and Authorized Agent and Representative for Herbert Aiken, et al.,

versus

JACKSONVILLE TERMINAL COMPANY

On this day this cause was called, and, after argument by Frank F. L'Engle, Esq., for appellants, and John Dickinson, Esq., for appellee, was submitted to the Court.

OPINION OF THE COURT AND DISSENTING OPINION OF HOLMES,
CIRCUIT JUDGE—Filed March 4, 1941

— IN THE —
United States Circuit Court of Appeals
FOR THE FIFTH CIRCUIT

— ● —
No. 9754

**C. L. WILLIAMS, INDIVIDUALLY AND AS DULY AP-
POINTED AND AUTHORIZED AGENT AND REP-
RESENTATIVE FOR HERBERT AIKEN, ET AL.,**

Appellants.

versus

JACKSONVILLE TERMINAL COMPANY,
Appellee.

*Appeal from the District Court of the United States
for the Southern District of Florida.*

—
(March 4, 1941.)
—

Before FOSTER, SIBLEY, and HOLMES,
Circuit Judges.

SIBLEY, Circuit Judge: This suit was brought under Section 16(b) of the Fair Labor Standards Act, 29 U. S. C. A. §201-219, in behalf of the station porters, called red caps, who worked at the Jacksonville Terminal between Oct. 24, 1938, the date the Act went into effect, and July 1, 1940, when a new wage arrangement was put into

2 Williams, et al. v. Jacksonville Terminal Co.

effect, to recover unpaid wages and an equal amount as liquidated damages. The main facts were admitted or stipulated, and on motions for summary judgment made by each side the decision was against recovery, and the red caps appeal.

Prior to October, 1938, these red caps, like others at many larger railroad terminals throughout the United States, were selected on their applications, by Jacksonville Terminal Company, furnished with uniforms which included red caps, and permitted to offer their services especially as porters of hand baggage to the passengers taking or leaving trains; they to look wholly to the passengers for their pay, but not to demand or argue about it but to take what was offered. The Terminal Company regarded the red caps not as employees, but as licensees permitted to do their own business on its premises on the conditions it laid down. On Sept. 29, 1938, the Interstate Commerce Commission made a decision, *Ex Parte* No. 72, 299 I. C. C. 410, that the red caps were employees for the purposes of the Railway Labor Act, and entitled to organize as such. If employees, they would on Oct. 24 become entitled to wages not less than twenty-five cents per hour for one year, and thirty cents per hour thereafter, under the Fair Labor Standards Act, Sect. 6, 29 U. S. C. A. §206. In recognition of this the Jacksonville Terminal Company, (as did other terminal companies), gave each red cap a written notice which referred to the Act and stated that in consideration of engaging in the handling of hand baggage and assisting passengers otherwise, the red cap must report daily to the Terminal Company "the amounts received by you as tips or remuneration for such services"; and that the Terminal Company guaranteed to each person continuing such service after Oct. 24, 1938, compensation which, including the sums above referred to, would not be less than the minimum provided by law; that tips or remuneration in excess of the minimum wage

and taxes might be retained by the recipient; and the right to make rules and regulations for the service and the accounting was asserted by the Terminal Company. The red caps claimed to be already organized for collective bargaining and their representative did not wish this "accounting and guaranty" plan of payment to be entered upon independently of a collective agreement with the red caps. No collective agreement was reached for about a year, and then it did not cover wages, there being an understanding that the validity of the accounting and guaranty plan under the law should be determined by the courts. In the meanwhile the red caps continued to serve and did account for their tips as required, until on July 1, 1940, another plan was put into effect whereby the Terminal Company directly paid fixed wages, and required the red caps to collect from passengers and turn in ten cents per parcel handled, under a system of baggage checks. Some of the red caps had received between Oct. 24, 1938, and July 1, 1940, more than minimum wages in tips and were paid nothing besides. All others had their deficits made up by the Terminal Company. In the aggregate, the Company had supplemented tips by an amount of \$8,321; and tips amounting to \$3,019 in excess of minimum wages had been retained by the recipients. Each red cap had received money equal to the minimum wage, or more. But the red caps say they never did agree expressly to this plan of payment, and outside of the \$8,321 they had been paid nothing by the Company, the tips being their own money. They claim a sum of \$59,923. The Terminal Company contends that the tips, especially after the notice, were the income of its own business, that the red caps have been fully paid with the Company's money, and that to require triple payment would be "legal brigandage". We think the vital question is, Whose money were the tips?

We will not stick upon the general meaning of the word "tip". Webster's International Dictionary makes the tip

to be a gift, a fee; and defines a fee as a compensation for service rendered. The Standard Dictionary says a tip is money given, as to a servant, to secure better or more prompt service. It would seem that a tip may range from a pure gift out of benevolence or friendship, to a compensation for a service measured by its supposed value but not fixed by an agreement. Most often the term is applied to what is paid a servant *in addition* to the regular compensation for his service, to secure better service or in recognition of it. But the Fair Labor Standards Act makes no reference to "tips", and the notice given the red caps refers to "tips or remuneration". We are not concerned with the proper meaning of the word, but with the legal status of what the passengers paid these red caps, by whatever name called. Along with dictionary definitions, we put aside a number of decisions cited about the ownership of tips; somewhat conflicting, because each dealt with its own kind of tip and none from an appellate court dealt with money paid a red cap by a passenger.

This record makes no effort to prove or agree on the actual intention of passenger, red cap, or Terminal Company, when at any time a porter service was rendered and remunerated. It is left to common knowledge and reasonable inference. Railroad travel is so general and red cap service so familiar that it may well be considered, as it touches the passenger, a matter of common knowledge. We so deal with it. Before the day of red caps the passenger depended for assistance on the chance presence of some jobless person, and paid him for his help. The red caps took the place of the jobless ones at large terminals, and rendered a supervised service; but the railroad carriers were not bound to afford any such service to the passenger, and the reward of it was left a matter between red cap and passenger, with the stipulation that the amount should be left to the passenger and there should never be annoyance or embarrassment about it. It may be that the red

caps were always employees of the Terminal Company in that it selected them and was probably answerable for their honesty and carefulness; but they were not employees for wages, their time and efforts were their own, and what they earned belonged to them. Passengers understood this; they knew that what they paid did not go to the Terminal Company, but was the meat and bread of the red cap. What they paid was influenced by the generosity and wealth of the passenger as well as by the number and weight of his bags, and at times by the needy appearance or the cheerfulness and promptness of the red cap. But in every case the tip was primarily a compensation for service, and not a gift. The red cap expected nothing unless he served. No passenger ever gave a red cap anything unless there was service. Every passenger paid for service unless he or she was very stingy or financially unable, or else ignorant that pay was expected. The acceptance of service carried an expectation of reward on both sides. What the red cap received was not gifts but earnings. If they amounted to enough he owed income taxes on them; and they belonged to him, either because the business was his, or if an employee, because his employer conceded them to him.

A great change occurred Oct. 24, 1938. The red caps had successfully established a status as employees and a right to organize. The Fair Labor Standards Act said that as employees they are *ipso facto* on wages whose amount should not be less than fixed sums per hour. Since the employer became absolutely bound to pay these sums for those hours and for the labor to be done in them, necessarily the work was his, and the product of it was his. The employer did not have to consent to this, nor did the employee. The law made the change for both. By merely maintaining their relationship each became bound by the law. Because what was received from passengers was not gifts but pay for services valued by the passenger,

it required no consent on the part of the red caps to make the earnings belong to the employer, who was now bound to pay for the time and efforts of the red caps during work hours. The red cap's reward was to be wages. The employer became entitled to his services and what was received for them. The notice given the red cap was sufficient to make his receipts the money of the employer.

The passengers after Oct. 24 still paid for service as before; but whether they realized it or not, they were now paying the Terminal Company for it. If they knew, they might have paid less, but the elimination of the human sympathy element would only make it more clear that what was paid was for service—not a gift. A pure gift, if one were ever made, would still belong to the red cap unless controlled by special arrangement with the employer, but the burden would be on the red cap to prove a gift in special instances. None are proven here.

The Act undoubtedly contemplates that the employee shall be paid his wages by the employer out of the employer's funds. But it does not prohibit the employee being given the duty of collecting the employer's money, and the privilege of paying himself out of it, subject to accounting, provided the employer stands ready to promptly pay any balance due the employee. For example, an interstate trolley company might authorize its conductor to collect cash fares, and account for them thus. The fares would belong to the employer, but the conductor might take and spend them to the extent of his wages, because the employer had authorized it. Otherwise he could not. We perceive no breach of the minimum wage provisions of the law in such an accounting arrangement fairly and promptly carried out. But we are far from saying that it is desirable. It is said in this record that as applied to red caps it has sometimes resulted in their reporting more tips than they received with a purpose to hold their jobs,

and so lost part of their wages. Under Section 11(c) of the Act, 29 U. S. C. A. §211(c), the Administrator has large power over the question of records, including accountings, and if the Administrator should find that any system of accounting practically interferes with the working of the Act, he could consider what regulation he should make. We do not think the Act condemns *ipso facto* all payment of wages by accounting, or requires us to say that although the employee got all he ought to have had of his employer's money, the employer must pay again because the employee was allowed to keep what was in his possession instead of paying it to the employer and receiving it back again.

The provision of Section 3(m), 29 U. S. C. A. §203(m), "Wage paid to any employee includes reasonable cost, as determined by the administrator, to the employer of furnishing such employee with board, lodging or other facilities . . .", refers to wage payments other than in money, and has no bearing upon the case. No credit on wages is claimed by reason of anything furnished, except the money retained by the employee. The uniforms furnished the red caps as clothing might come within the definition, but the terminal and its trucks and rolling chairs and its equipment are not facilities furnished. The last named are not furnished to the red caps as their facilities, but are things which the employer keeps for use in his own business, and which he employs the red cap to use. The recompense for them is to come not from the wages of the red caps, but from the income of the business, including the collections by the red caps from the passengers.

When it is clearly apprehended that red cap tips are not personal gifts, but compensation for service which since Oct. 24, 1938, is rendered by the red caps for the Terminal Company for a wage which the Terminal Company is absolutely bound to pay, it becomes plain that the tip money

is the money of the Terminal Company, irrespective of the consent of the red caps; and when they are paid their wages in part or in whole out of it, they are not paid with their own but their employer's money.

JUDGMENT AFFIRMED.

HOLMES, Circuit Judge, dissenting:

The adage that hard cases make bad precedents is very true. I am afraid the adage is exemplified in this case, but the principle involved is more important than the amount of money sought to be recovered.

This case turns largely upon the meaning to be given the word *tips*. If what the red caps received were gifts or gratuities, they had the right to keep them for themselves. Whatever moral compulsion one may have been under to tip red caps, Pullman porters, or other employees, there was no legal obligation to do so during the period here involved. I think if Congress had intended that tips should be included in the meaning of the word *wages*, it would have said so.

The majority opinion is not concerned with the proper meaning of the word *tips*. It says: "along with dictionary definitions, we put aside a number of decisions cited about the ownership of tips, somewhat conflicting, because each dealt with its own kind of tip and none dealt with money paid a red cap by a passenger."

The general rule is that words should be given their usual and ordinary meanings, unless the contrary clearly

appears from the circumstances in which they are used. I dissent for the above and the further reasons fully stated by the district court in its opinion reported in *Pickett v. Union Terminal Co.*, 33 Fed. Supp. 244.

A True copy:

Teste:



Clerk of the United States Circuit Court of
Appeals for the Fifth Circuit.

JUDGMENT

Extract from the Minutes of March 4th, 1941

No. 9754

C. L. WILLIAMS, Individually and as Duly Appointed and
Authorized Agent and Representative for Herbert Aiken,
et al.,

versus

JACKSONVILLE TERMINAL COMPANY

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellants, C. L. Williams, individually and as duly appointed and authorized agent and representative for Herbert Aiken, and others, and the surety on the appeal bond herein, Fidelity and Deposit Company of Maryland, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

"Holmes, Circuit Judge, dissents."

MOTION AND ORDER STAYING MANDATE—Filed March 27, 1941

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 9754

C. E. WILLIAMS, Individually and as Duly Appointed and
Authorized Agent and Representative for Herbert Aikens,
et al., Appellants,

VERSUS

JACKSONVILLE TERMINAL COMPANY, a Corporation; Appellee

APPLICATION FOR STAY OF MANDATE

To the Honorables, the Judges of the United States Circuit
Court of Appeals for the Fifth Circuit:

Comes now the appellants, C. E. Williams, Individually
and as duly appointed and authorized agent and representa-
tive for Herbert Aikens, et al.; and respectfully represents
that the appellants above named desire to file with The Su-
preme Court of the United States of America, a petition
for a Writ of Certiorari to review the judgment of this
Honorable Court rendered in this cause in affirming the
Judgment of the District Court of the United States for the
Southern District of Florida.

Wherefore, the appellants respectfully apply for an Order
of this Honorable Court, staying the mandate herein for a
reasonable time in order to allow appellants an opportunity
to prepare and present their Petition for a Writ of Cer-
tiorari to the Supreme Court of the United States of
America.

(Signed) Frank F. L'Engle, Attorney for Appel-
lants, Montague Rosenberg, Of Counsel.

Copy of the foregoing application for stay of mandate
received the 13th day of March, A. D. 1941.

(Signed) Julian Hartridge, John Dickinson, Attor-
neys for Appellee.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH
DISTRICT

No. 9754

C. L. WILLIAMS, Individually and as Duly Appointed and
Authorized Agent and Representative for Herbert Aiken,
et al., Appellants,

versus

JACKSONVILLE TERMINAL COMPANY, Appellee

On Consideration of the Application of the appellants in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 17th day of March, 1941.

(Signed) Saml. H. Sibley, United States Circuit
Judge.Clerk's Certificate to foregoing transcript omitted in
printing.

(4591)

7 SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(7483)

112

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

C. L. WILLIAMS, Individually and
as duly appointed and authorized
agent and representative for
HERBERT AIKEN, et al.,

~~Appellants~~, *Petitioners*

vs.

JACKSONVILLE TERMINAL COMPANY,
a corporation,

~~Appellee~~. *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of
Appeals for the Fifth Circuit,

and

BRIEF IN SUPPORT THEREOF.

FRANK F. L'ENGLE

525 Barnett National Bank Building
Jacksonville, Florida
Attorney for Petitioners.

MONTAGUE ROSENBERG

1010 Graham Building
Jacksonville, Florida
Of Counsel.

INDEX TO PETITION

Page

Petition for writ of certiorari.....	1
Statement of the fact and the matter involved.....	2
Opinions below	11
Jurisdiction	12
Questions presented	12
Statutes involved	13
Specification of errors to be urged.....	16
Réasons for granting the writ.....	18
Conclusion	18

TO BRIEF

Brief in support of petition for certiorari.....	19
Opinions of the courts below.....	19
Statement of the case.....	19
Specification of errors to be urged.....	19
Summary of argument.....	19
Argument	21
1. Whether or not the notice of the defendant to the plaintiffs, posted October 24th, 1938, (R. 10, 121, 155) had any validity whatsoever in law or in fact after com- plete abandonment by both parties and the very matter, to-wit, wages of the Red Caps being negotiated and finally settled some eighteen months subsequent to the deliv- ery and posting of said notice.	21

2. Whether or not tips or gratuities received by the Red Caps from passengers under a contract with the employer that such tips and gratuities so received constituted their compensation could by a unilateral action be appropriated by the defendant, Terminal Company, against the consent of the employees and used by the defendant, Terminal Company, as a part payment of the minimum mandatory wage required by the Fair Labor Standards Act to be paid by the employer (Terminal Company) to the employees (Red Caps).

TABLE OF CASES CITED

	Page
Aetna Insurance Company vs. Church (1871). 21 Ohio St. 492.....	31
Colver vs. Foster Screen Co., 99 N. J. Eq. 734....	29
67 Corpus Juris 284	29
Williams vs. Jacksonville Terminal Company 35 Fed. Supp. 267	19
Williams vs. Jacksonville Terminal Company 118 Fed. (2nd) 328	19
First Nat. Bank of Wilkes-Barre vs. Barnum, 160 F. 245	30
Gay vs. Hudson, 178 F. 499, 503 citing Moore vs. Heaney, 14 Md. 558	29
Gay vs. Paige (1907) 150 Mich. 463, 114 N. W. 217	31
Gurewitz (2 Cir.) 121 F. 982	20
La Juett vs. Coty Machine Company, 272 N. Y. S. 822	29
McRae vs. McBeath 5 N. B. 446	31
Pickett vs. Union Terminal 33 F. Supp. 244	30
Polites vs. Barlin (Ky. 1912) 147 S. W. 829	31
Roberts vs. Frank Carruthers & Bros. (Ky.) 1918, 202 S. W. 659, 661	29
Zappas vs. Roumeltote 156 Iowa 709, 137 N. W. 935	31

STATUTES

	Page
Sections 3 (m), 6 (a) and 11 (c) of Fair Labor Standards Act, c. 676	13
Sections 3 (m), 6 (a) and 11 (c), 52 Statutes 1060, United States Code Annotated Title 29	13
Sections 203 (m), 206 (a) and 211 (c)	13
Section 2 of Railway Labor Act as amended c. 347	13
Section 2, 44 Statutes 577, as amended June 21, 1934, c. 691	15
Section 2, 48 Statutes 1186, United States Code Annotated Title 45 Section 152	15

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

C. L. WILLIAMS, Individually and
as duly appointed and authorized
agent and representative for
HERBERT AIKEN, et al.,

~~Appellants~~, *Petitioners*

vs.

JACKSONVILLE TERMINAL COMPANY,

~~Appellee~~. *Respondent*

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of
Appeals for the Fifth Circuit,

May It Please The Court:

C. L. WILLIAMS, individually and as duly appointed and authorized agent and representative for Herbert Aiken, and others, prays that a writ of certiorari may issue out of this Honorable Court to review a Judgment (R. 214) of the United States Circuit Court of Appeals for the Fifth Circuit, entered March 4th, 1941, sustaining a Judgment of the District Court of the United States for the Southern District of Florida (R. 195).

STATEMENT OF THE FACTS AND THE MATTERS INVOLVED

The plaintiff, C. L. Williams, individually and as agent of the other plaintiffs under the authority of Section 16-B of the Fair Labor Standards Act of 1938, 29 U. S. C. A. 201-216 (June 25, 1938), Chapter 676, 52 Statutes 1060, in the complaint filed in the United States District Court, Southern District of Florida, alleged that they were employees within the scope and provisions of the Fair Labor Standards Act and as such employees were entitled to the minimum wages prescribed by Section 6 (a) of said Act.

The complaint further alleged that the employer being engaged in Interstate Commerce and the work required of the plaintiffs was likewise that of Interstate Commerce, the defendant, Jacksonville Terminal Company, was required to pay plaintiffs not less than twenty-five cents per hour from October 24th, 1938, to October 23rd, 1939, and thirty cents from the last mentioned date to June 30th, 1940, (R. 4). July 1st, 1940, the plaintiffs were "put on the minimum rate of \$2.40 for eight hours" (R. 64) (R. 87) and on August 1st, 1940, a definite final agreement made the minimum wage established by the "Hours and Wage Law" the rate of pay for plaintiffs (R. 134). The complaint further alleged the neglect or refusal of the defendants to pay the minimum wage prescribed by the Act and asked for liquidated damages and attorneys fees each allowed plaintiff under the provisions of the Fair Labor Standards Act.

The defendant answered denying that it had violated the Fair Labor Standards Act in refusing to pay the minimum wage, to which answer was attached a bill of particulars. The answer further alleged and *admitted* that the plaintiff, (Red Caps), by a ruling of the Interstate Commerce Commission, dated September 28th, 1938, had been designated as employees under the Railway Labor Act. (R-9).

The parties stipulated (R-47):

1. That the defendant was engaged in Interstate Commerce.

2. That the plaintiffs were employees of the defendant from July 10th, 1937, to the date of filing the bill of complaint as defined by the Fair Labor Standards Act.

3. That the plaintiffs, while so employed, were engaged in Interstate Commerce as defined by the Fair Labor Standards Act.

4. That the bill of particulars attached to defendant's answer was a true statement of the number of hours worked by each of the plaintiffs, the amount received by each of the plaintiffs from the passengers, and the amount paid to each of the plaintiffs by the defendant by check drawn against the funds of the defendant.

Plaintiffs, had been employed by the Jacksonville Terminal Company as Red Caps, for many years under an agreement whereby they were

required among other duties, "in handling of hand baggage and traveling effects of passengers or otherwise assisting them (passengers) at or about stations or destinations" (defendant's answer [R-10, Par. 8]) to report at the Terminal at certain designated times, to meet certain trains, to take off certain passengers from the trains and to generally assist passengers using the Terminals in and about the trains, stations and taxicabs. The sole compensation was the tips or gratuities received from the public. The Red Caps were not permitted under penalty of dismissal to ask for tips or gratuities but were required to furnish the service gratis. The Terminal Company paid the Red Caps nothing.

For approximately two years prior to September, 1938, (R-30) the Red Caps had been seeking representation by Mr. L. L. Wooten, as General Chairman representing (or) The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, of the Jacksonville Terminal Company among others and the Atlantic Coast Line Railroad, for help either to get a working agreement for them with the defendant Terminal Company or to be included in the agreement of the Brotherhood and the defendant Terminal Company. July 10th, 1937, a proceeding was started in the Interstate Commerce Commission (R-9) for the purpose of classifying the Red Caps as employees of the Terminal Company; September 29th, 1938, the Interstate Commerce Commission ruled the Red Caps were employees within the definition contained in the Railway Labor Act as amended.

Upon receipt of the above mentioned order of the Commission, Wooten on October 25th, 1938, wrote defendant, Jacksonville Terminal Company, (R-94) to the effect that the Red Caps at the Jacksonville Terminal were covered "by the scope rule of our agreement all other rules covering group 3 are applicable" (R-166) and requesting the advice as to the position of the Terminal Company.

The previous day, October 24th, 1938,—the effective date of the Fair Labor Standards Act, the Terminal Company notified the Red Caps (defendant's answer ([R-10, Par. 8 and R-121]) that they would be required to report daily the tips or remuneration received by him for the services rendered passengers. The notice contained a guarantee of compensation, including the tips received, of not less than the minimum wage required by law. This arrangement being now designated by all parties as the *accounting* and *guarantee* plan.

Mr. J. L. Wilkes, President-General Manager of the defendant, Jacksonville Terminal Company, on October 27th, 1938, (R-122) acknowledged receipt of Wooten's notice in a letter in which the Terminal Company, challenged Wooten's right to represent and denied the statement that the Red Caps were covered by the agreement of February, 1937, (R-166).

November 4th, a conference was held in Jacksonville, Florida, between Wooten, representing the plaintiff Red Caps, and Wilkes, representing the Terminal Company — from that date on, The Brotherhood's (represented by Wooten,) right to

negotiate for the Red Caps was never again challenged (R-61 and 62).

Wooten's contention that the Red Caps were covered or included in the agreement of February, 1937, (R. 94 and 166) was not again denied, challenged or controverted by the Terminal Company. Beginning with a letter of October 25th, 1938, through June 16, 1939, Wooten in his representative capacity made twelve or more additional written requests for the entering into of a supplemental agreement to the collective bargaining agreement of February, 1937, (R. 94, 96, 97, 98 and 99). November 30th, 1938, (R. 98) Wooten forwarded a proposed agreement (R. 136) of the result of a previous conference, which proposed agreement (R. 138) included a memorandum containing eight definite rules agreed upon (R. 98 and 99) as the first amendment to the collective bargaining agreement claimed by Wooten, in his representative capacity, to cover the Red Caps. This agreement in Paragraph 9 contained a specific rule requiring the minimum wage under the Fair Labor Standards Act to be paid the Red Caps. The Terminal Company refused to accept this agreement. However, during the month of June, 1939, a similar agreement was actually entered into by Wilkes on behalf of the Terminal Company and Wooten on behalf of the Red Caps (R. 107), which was the first amendment to the collective bargaining agreement of February, 1937. August 9, 1940, (R. 134) the agreement effective June 16th, 1939, (R. 107) was amended, which agreement in paragraphs 1 and 2 thereof finally and definitely set a wage rule

and was the second amendment of the collective bargaining agreement of February, 1937, which agreement Wooten definitely contended throughout the period of negotiations, from his letter of October 25th, 1938, to June 16th, 1939, was the collective bargaining agreement under which the Red Caps were then working. With the exception of the letter of Wilkes, as representative of the defendant, Terminal Company, to Wooten of October 27th, 1938, (R. 122) there is no challenge in the record that this agreement of February, 1937, (R. 166) was not the collective bargaining agreement under which the Red Caps were working.

The tentative or proposed supplemental agreement tendered Wilkes on November 30th, 1938, (R. 138) was taken paragraph by paragraph from this agreement of February, 1937, (R. 166), which Wooten always contended covered the Red Caps. The agreement entered into the following June, 1939, (R. 107) was, with the elimination of paragraph 9, practically the same agreement as the proposed agreement of November 30th, 1938, (R. 138) and the original agreement of February, 1937, (R. 166).

To the many requests of Wooten to the defendant, Terminal Company, for a definite settlement of the controversy raised by the letter of Wooten to the defendant, Terminal Company, dated October 25th, 1938, (R-93) and Wilkes' reply thereto of October 27th, 1938, (R-122) there are five letters from the Terminal Company, none of which challenge the contention of Wooten that the Red Caps

were covered by the collective bargaining agreement of February, 1937, (R-166), but each of which sought to postpone the final determination of the question of wages—which included the question of whether or not tips could or should be included in a wage to be paid by the Terminal Company under the Fair Labor Standards Act.

The plaintiffs refused to accept the conditions set forth in the notice of October 24th, 1938, (Plaintiff's answer, page 8, [R-10 and R-121]) through their duly authorized and recognized representative, Wooten, continued to negotiate or attempt to reach an agreement concerning not only the working conditions but primarily the rate of pay.

The agreement effective June 16th, 1939, (R-107) specifically excluded the question of wages and it was either mutually agreed between Wooten representing the Red Caps and Wilkes representing the Terminal Company that

“we could negotiate all the rules except the wage rules and enter into an agreement to apply whatever was finally ruled on by the Wage and Hour Administrator with regard to the payment of wages (see plaintiff's exhibit No. 11, [R-106 and 107]) and then withdraw the case from mediation, as I believe from our letters and conferences we are pretty well agreed on all the questions involved except that of wages (Wooten's letter dated May 26th, 1939, [R-107])”.

While the above mentioned negotiations were going on between the representatives of both parties

the Red Caps were consistently reporting the amount of tips received from the passengers each day and likewise either retaining each and every the tips as they had theretofore done for the whole period of service or for the past 17 years or more. Under the accounting and guarantee plan the Terminal Company neglected or failed, or refused to pay or make good the guarantee until required by a representative of the Wage and Hour Department who had checked its records to ascertain whether or not the Red Caps had received the money which the payrolls of the Terminal Company indicated had been paid them, (R-66).

The first money received by the Red Caps was subsequent to August 15th, 1939, at which time each of the Red Caps receiving any money, in signing a receipt therefor, retained and refused to forfeit or release any right to sue for any additional money that might be due under section 16 (b) of the Fair Labor Standards Act (R-165).

Even after the agreement (R-166) effective June 16th, 1939, was entered into, wages having been expressly excluded therefrom, it was mutually understood by Wooten, representing the Red Caps and Wilkes, representing the Terminal Company that the question of tips as wages, was a matter for determination either by the Administrator of the Act or by some Court of competent jurisdiction. October 12th, 1939, the Administrator of the Fair Labor Standards Act, acting through one Gustave Peck, (R. 164) after a hearing refused to rule on the validity of the accounting and guarantee ar-

rangement as being a compliance with the Fair Labor Standards Act and specifically recommended the matter be determined by a Court of competent jurisdiction. Each of the parties to this litigation recognized said authority and either agreed, or it was mutually acquiesced in by each of the parties, that the further final determination of validity of the accounting and guarantee plan, or whether or not tips could be considered as payment of wages under the Fair Labor Standards Act, should be settled by a Court of competent jurisdiction.

During the period of time from October 12th, 1939, to March, 1940; there was either pending or in the process of being instituted several suits involving the accounting and guarantee plan (R. 81 and 82). March 7th, 1940, a suit was instituted in the District Court of the United States for the Northern District of Texas, entitled "A. J. Pickett, etc., et al. vs. Union Terminal Company", which suit terminated in the District Court in favor of the Red Caps. Upon rendition of that judgment further conferences were had between Wooten, representing the Red Caps, and Wilkes, representing the Terminal Company, and upon refusal of the Terminal Company to compensate the Red Caps other than by the accounting and guarantee system, above outlined, this action was commenced.

In short (R-83 and 84):

"Q. Back of July 1, 1940, to the effective date of the act, was there any agreement or understanding between you and Mr. Wilkes that this accounting and guarantee system would be the amount

that these men would receive under the Fair Labor Standards Act?

A. No, sir.

Q. In other words, the whole thing was under negotiation at all times, and no definite agreement was ever entered into as to the rate of pay of the men under this accounting and guarantee system until judicial determination of that wage question was made?

A. I have already stated that it was a dispute existing under the terms of the amended Railway Labor Act effecting the wages of these Red Caps.

Q. Then you never accepted this guarantee and the accounting system on behalf of the Red Caps at all?

A. 'No, sir.'

OPINIONS BELOW

A summary judgment was entered by the United States District Court in and for the Southern District of Florida, containing written findings of fact and conclusions of law reported in the record at pages 195 through 203, the cases cited being reported in 35 Federal Supplement 267.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit will be found at page 214 through 222 of the record and being reported in 118 Federal (2nd) 324.

JURISDICTION

The jurisdiction of this Court is invoked under Section 340 (a) of the Judicial Code as amended by the Act of February 13th, 1925, c. 229, Section 1, 43 Stat. 938, U. S. C. A. Title 28, Section 347 (a).

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit sought to be reviewed was entered on the 4th day of March, 1941, (R. 214).

QUESTIONS PRESENTED

1. Whether or not a Terminal Company subject to the Railway Labor Act and the Fair Labor Standards Act employing Red Caps also covered by the terms of said acts, will be permitted to violate section 156 of Railway Labor Act and assert any right or privilege under the unilateral action of serving notice upon said employee to report tips and gratuities received from the passengers, for the purpose of using tips reported as payment in whole or in part of minimum wage required by the Fair Labor Standards Act after (1) more than 20 months of abandonment of the conditions attempted to be imposed by said notice, (2) recognition of a collective bargaining agreement between said Terminal Company and said Red Caps and (3) 20 months of negotiations relative to the modification of the collective bargaining agreement so recognized and the settlement of the identical matters, to-wit, wages and working conditions which were attempted to be changed by said notice.

2. Under the facts in the preceding question, has a Railroad Terminal Company, which prior to the effective date of the Fair Labor Standards Act employed Red Caps at its Terminal under a plan by which the Red Caps received no compensation from the employer other than the right to retain all tips and gratuities received from passengers, complied with Section 6 of the Fair Labor Standards Act by the serving of a notice upon the Red Caps that from the effective date of the Fair Labor Standards Act requiring the employees (Red Caps) to report all tips and gratuities so received and guarantees to said Red Caps the payment of the difference between the tips and gratuities so reported and the minimum wage required by the Fair Labor Standards Act of 1938.

3. Whether or not the mandatory provision of Section 6, of the Fair Labor Standards Act, is satisfied by the application of tips or gratuities received by Red Caps from passengers as payment in whole or in part of the minimum mandatory wage required by said Act to be paid to the employees (Red Caps) by the employer (Terminal Company).

STATUTES INVOLVED

The statutes involved are Sections 3 (m), 6 (a) and 11 (c) of the Fair Labor Standards Act of 1938, c. 676; Sections 3 (m), 6 (a) and 11 (c), 52 Stat. 1060, U. S. C. A., Title 29; Sections 203 (m), 206 (a) and 211 (c), and Section 2 of the Railway Labor Act, as amended, c. 347; Section 2, 44 Stat. 577, as amended June 21, 1934, c. 691; Section 2, 48 Stat. 1186, U. S. C. A., Title 45, Section 152.

The provisions of the Fair Labor Standards Act of 1938 primarily involved are:

* * *

Section 3. As used in this chapter—

"(m) 'Wage' paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees."

Section 6.

"(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

"(1) during the first year from the effective date of this section, not less than 25 cents an hour.

"(2) during the next six years from such date, not less than 30 cents an hour."

* * *

Section 11.

"(c) Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall

prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder."

* * *

Section 156 of the Railway Labor Act says:

"156. Procedure in changing rates of pay, rules, or working conditions.—Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act (Par. 155 of this title), by the Mediation Board, unless a period of ten days has elapsed after termination of conference without request for or proffer of the services of the Mediation Board. (May 20, 1926, c. 347, Par. 6, 44 Stat. 582; June 21, 1934, c. 69, Par. 6, 48 Stat. 1197)." 45 U. S. C. Sect. 156.

* * *

SPECIFICATIONS OF ERRORS TO BE URGED

The Court below erred:

1. In holding that the Railroad may be its own fiat disregarding its existing bargaining agreement with Red Caps and pending negotiations with their accredited representative, by its own unilateral action effect a change in the rates of pay and working conditions in the fact of a continued series of protests and refusals to consent.

2. In holding that the Fair Labor Standards Act operated to give to the Railroad the property of its employee Red Caps in the nature of their tips, the gifts and gratuities to them from the general public.

3. In holding that the Railroad's notice to the Red Caps was sufficient in law to sustain the appropriation of the tips by the Terminal Company which had always been the property of the Red Caps by the contract of employment the property of the Railroad, despite the failure of the notice to assert ownership of the tips.

4. By holding that because the employer became liable to pay a wage, a tip from the public became a charge—which the railroad never imposed for Red Caps service—irrespective of the Railroad's right to so impose a charge—either before or after enactment of Fair Labor Standards Act.

5. By holding that a member of the general public, in giving a tip, had his donation converted

into a payment of a charge irrespective of his intention and despite the fact that there was no charge—because of the Railroad's absolute obligation to pay its employees a stated wage.

6. By holding that the Wages and Hours Law operated to change tips into wages because of the obligation of an employer to pay wages.

7. In holding that because the Fair Labor Standards Act made the Railroads owe the employees wages, that said act operated to require the tipping public to pay these wages.

8. In holding that tips were not personal gifts of the passengers to the Red Cap employees but charges paid the agent of the employer despite conceded gratuitous character of tips over a 17 year period by employer and employee and despite the employer's standing instructions that an employee must not demand a charge or tip for service which instruction remained unchanged by the notice.

9. By holding that the Railroad could assert that its notice imposed a condition of employment, despite the Railroad's clear abandonment and waiver thereof; and despite the Railroad's execution of a collective bargaining agreement silent on wages and rates of pay for the admitted purpose of awaiting an authoritative determination of the Red Caps' right to and ownership of tips.

REASONS FOR GRANTING THE WRIT

That the Circuit Court of Appeals for the Fifth Circuit has decided important questions of Federal law which have not been, but should be, settled by this Court.

First: The construction and application of the Railway Labor Act to the first and second questions presented in the Section of this brief entitled "Questions Presented".

Second: The construction and application of the Fair Labor Standards Act to the third question presented in the section of this brief, entitled "Questions Presented."

CONCLUSION

For the above-stated reasons petitioners respectfully submit that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered March 4th, 1941, should be granted.

FRANK F. L'ENGLE
Attorney for Petitioners

Montague Rosenberg
Of Counsel

MAY, 1941.

**BRIEF IN SUPPORT OF PETITION FOR
CERTIORARI
OPINIONS OF THE COURT BELOW**

A summary judgment was entered by the United States District Court in and for the Southern District of Florida, containing written findings of fact and conclusions of law reported in the record at pages 195 through 203, the case cited being reported in 35 Federal Supplement 267.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit will be found at page 214 through 222 of the record and being reported in 118 Federal (2nd) 328.

STATEMENT OF THE CASE

The case is fully stated in the petition for certiorari in the paragraph entitled "Statement of Facts and Matters Involved", and for brevity will not be repeated. Any extension of the evidenciary points involved will be made in the course of the argument.

SPECIFICATIONS OF ERRORS TO BE URGED

The errors submitted for the Court's consideration are fully set forth in the petition for certiorari, repetition of which petitioners respectfully submit being unnecessary.

SUMMARY OF ARGUMENT

The petitioners respectfully present as a summary of argument the two questions presented under the title in the paragraph in the petition entitled "Reasons for Granting the Writ", that is:

1. Whether or not the notice of the defendant to the plaintiffs, posted October 24th, 1938, (R. 10, 121, 155) had any validity whatsoever in law or in fact after complete abandonment by both parties and the very matter, to-wit, wages of the Red Caps being negotiated and finally settled some eighteen months subsequent to the delivery and posting of said notice.

2. Whether or not tips or gratuities received by the Red Caps from passengers under a contract with the employer that such tips and gratuities so received constituted their compensation could by a unilateral action be appropriated by the defendant, Terminal Company, against the consent of the employees and used by the defendant, Terminal Company, as a part payment of the minimum mandatory wage required by the Fair Labor Standards Act to be paid by the employer (Terminal Company) to the employees (Red Caps).

ARGUMENT

Whether or Not the Notice of the Defendant to the Plaintiff Posted October 24th, 1938, (R. 10, 121, 155) Had Any Validity Whatsoever in Law or in Fact After Complete Abandonment by Both Parties and the Very Matter, To-Wit, Wages of the Red Caps Being Negotiated and Finally Settled Some Eighteen Months Subsequent to the Delivery and Posting of Said Notice.

This proposition will be, in this brief, treated under two questions:

First: The effect of the notice to the Plaintiff under section 156 of the Railway Labor Act.

Second: The consideration given the notice by the Terminal Company and the Red Caps.

FIRST QUESTION

First: The Effect of the Notice to the Plaintiffs Under Section 156 of the Railway Act.

Approximately one month before the effective date of the Fair Labor Standards Act, the Interstate Commerce Commission by its ruling determined the status of the Red Caps as *employees* covered by the Railway Labor Act. All other status, titles, designations, or ideas, such as licensees of the Terminal Company, or even trespassers—ceased. They were employees.

By continuing to allow the Red Caps to receive tips and gratuities from the passengers as their compensation, the Terminal Company ratified or confirmed the contractual relations regarding the right to and ownership of tips as being the property of the Red Caps, or in other words, their wages for the work performed for the company. It was at this time September 28th, 1938, that the Terminal Company may have made a new agreement—not after effective date of the Fair Labor Standards Act—for the agreement of February, 1937, was then effective and no change could be made without violation of Section 156 of the Railway Labor Act.

October 25th, 1938, Wooten, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees advised the Terminal Company, the Brotherhood had jurisdiction over the Red Caps and that their agreement of February, 1937, covered the Red Caps. October 27th, 1938, the Terminal Company challenged both this jurisdiction and this coverage claimed by Wooten.

But the right of the Brotherhood to represent under, and the coverage of the Red Caps by, the then existing collective bargaining agreement of February, 1937, (R-166), was at the conference of November 4th, 1938, between two representatives of the parties, forever settled.

"A. Mr. Wooten has done all the bargaining and consulting with me in regard to the Red Caps, although I have not at all times agreed with his conclusions. Mr. Wooten has come to see me in regard to the Red Caps." (R-61).

The only authority Wooten had to treat with Wilkes for the Red Caps was the collective bargaining agreement of February, 1937. Wilkes could not receive him as agent of the Red Caps with his fingers crossed as to the authority to represent.

The Terminal Company's recognition of Wooten and its subsequent failure to challenge the coverage of the Red Caps by the agreement of February 17th, 1937, until after the institution of this suit leaves the inescapable conclusion that each of the parties considered that this agreement covered these Red Caps from the date of the ruling of the Interstate Commerce Commission.

On November 30th, 1938, Mr. Wooten submitted an amendment to this February, 1937, agreement, which was not acceptable to the defendant, (R. 138-147). Negotiations continued and June 16th, 1939, (R. 107 to 116) an agreement was entered into which is substantially the same as the agreement submitted on November 30th, 1938, (R. 138) but by agreement, silent as to wages. In both of these amendments paragraph after paragraph was taken from the February 1st, 1937, (R. 166) agreement, such paragraphs incorporated without change in the final agreement effective June 16th, 1939. This agreement was subsequently amended as to rates of pay subsequent to August 1st, 1940, (R. 133 and 134).

The collective bargaining agreement of February 1st, 1937, and the subsequent amendments thereto, is the collective bargaining agreement which Section 156 of the Railway Labor Act pre-

vented the Terminal Company from altering and held status quo the right of the Red Caps to the tips and gratuities received from the passengers.

The simple words of the layman, Wooten to Wilkes (R. 97) in the letter of November 26th, 1938;

"We have advised you that we will expect the terms of our existing agreement to apply to the Red Caps until such time as changes might be made."

was never by any subsequent word or action, contradicted or challenged but was by the subsequent negotiations ratified and confirmed.

The Terminal Company had no right under the Railway Labor Act, to appropriate for its use the tips reported by the employees and thereby attempting to change the existing agreement as to wages without a direct violation of Section 156 of the Railway Labor Act. To condone such a proposition the whole effect of the Railway Labor Act will be stultified and emasculated. Can the defendant say—yes, we negotiate—and afterwards say, but we cannot by such negotiations be bound because by unilateral action, we posted a notice which we now assert imposed a condition which you could take or leave—withstanding your existing bargaining agreement; notwithstanding its recognition by us; notwithstanding our continued negotiations with you; notwithstanding our duty to deal with one entity in one way alone—your bargaining agent—we will insist that we deal with you individually—imposes a condition of contract and

thus we avoid the effect of both the Railway Labor Act and the mandatory provision of the Fair Labor Standards Act.

Second: The Consideration of the Notice by the Terminal Company and the Red Caps.

The Red Caps did not accept the terms of the notice as appropriation by the Terminal Company of the tips or gratuities to pay in part or in whole, the wage that they were entitled to under the Fair Labor Standards Act.

To the contrary the next day after the effective date of the Act, which was also the date of the notice, Mr. Wooten, representing the Red Caps, asked for the first conference concerning the very matters contained in the notice.

From this date to within two or three weeks prior to the filing of this suit, there was a continued attempt, request and demand by Wooten upon Wilkes, and conferences and negotiations between Wooten for the Red Caps and Wilkes for the Terminal Company, to consider the question of wages and the relation of tips to wages, Wooten contending at all times that tips were property of the Red Caps.

The Terminal Company in the notice did not assert ownership of the tips but specifically continued to the Red Caps, the privilege to retain their tips. (Its representative, Mr. Wilkes, never contending that tips were wages, his whole attitude being that the plan was one of substitution until

some judicial determination was rendered adjudicating the validity of the plan).

His whole action, attitude towards, and consideration of this question was one of delay.

"My people wish to see what ruling will be on tips before we can agree to wage rates."
(R-128).

This quoted matter appears in the letter, Plaintiffs' Exhibit 24, from Wilkes to Wooten, dated March 4, 1939, and again,

"This question * * * has been carefully considered by this company and its owning carriers. Several suits * * * seem to have the same main question of issue as is involved here, i. e. whether tips can be considered wages."
(R-136).

This quotation being in Plaintiffs' Exhibit 31, letter from Wilkes to Wooten, dated August 14, 1940.

October 25th, 1938, Wooten advised the Terminal Company that the bargaining agreement of February, 1937, covered the men and requested a conference. (R-10). Negotiations and conferences continued and it was recognized by both sides that there was an existing dispute as to wages and hours. By these negotiations the Terminal Company clearly abandoned and waived any effect sought to be given the notice and never claimed or pretended to claim ownership of the tips.

The Terminal Company did not further consider the notice and even neglected or refused to pay

the amount guaranteed by the notice until under the compulsion of an audit of the Wage and Hour Division of the Department of Labor of August, 1939, at which time, each receipt of the Red Caps for the money actually paid by the Terminal Company contained a notice of the amounts due Red Caps under the Fair Labor Standards Act. (R.165).

The Terminal Company paid no tax on the tips reported; but paid only on the amounts they actually paid the Red Caps. (R-70).

This abandonment in fact and the waiver of any rights under the notice by the Terminal Company by its subsequent conduct, and retention by Red Caps of their right to assert a claim for back wages under the Fair Labor Standards Act, clearly indicated that neither the Red Caps nor the Terminal Company considered the notice as having any legal or factual validity.

Not until the first hearing on the motions for summary judgment in the District Court was this ownership of the tips by the Terminal Company first asserted and then only as a construction of counsel. That construction is not in the record.

The refusal of the Red Caps to accept the notice; the abandonment of the notice by the Terminal Company; the subsequent joint negotiations and conferences by the parties regarding the very matter; tips in relation to wage contained in the notice can permit but one construction, i. e. no final determination; no effect whatever; a nullity.

And the blunt fact remains that the employer has not paid the minimum wage that the Fair Labor Standards Act requires every employer shall pay.

Whether or Not the Mandatory Provision of Section 6, of the Fair Labor Standards Act, is Satisfied by the Application of Tips or Gratuities Received by Red Caps from Passengers as Payment in Whole or in Part of the Minimum Mandatory Wage Required by Said Act to be Paid to the Employer (Terminal Company).

Section 206 of the Fair Labor Standards Act 1938 says:

"(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates."

We are dealing here only with Fair Labor Standards Act and not any other Act, statute or ruling of any commission. It is the mandatory requirement of the act "that the employer shall pay." The act contains no word, or words, or phrases suggesting any guarantee of payment. So that no substitute could be used to avoid the effect of this mandatory provision, Congress saw fit to make one exception, that is, to allow board, lodging, and other facilities to be considered as part of the wages to be paid.

To prevent abuse of this exception, the manner of ascertaining the money value of such board and lodging and other facilities to be determined solely by the Administrator of the act.

'This we submit, is the only manner in which the Terminal Company or any other employer could substitute anything of value as part of the wage mandatorily required to be paid.

"I think that if Congress had intended that tips be included in the meaning of the word wages, it would have said so." Dissenting opinion of Judge Holmes. (R-221).

The adjudicated cases definitely hold that;

Wages are the reward paid for labor; a compensation given to a hired person for his or her services.

In Re: Gurewitz (2 Cir.) 121 F. 982;

"Both salary and wages are terms invariably used in defining the consideration which an *employer bestows* upon one who is serving him in consideration of his services, and is never applied in describing the gain, profit or recompense which accrued to one who is conducting a business of his own and upon his own account."

See also:

Roberts vs. Frank Carruthers & Bros. (Ky.) 1918, 202 S. W. 659, 661.

Gay vs. Hudson, 178 F. 499, 503, citing Moore vs. Heaney, 14 Md. 558.

67 C. J. 284.

Colyer vs. Foster Screen Co., 99 N. J. Eq. 734.

La Juett vs. Coty Machine Company, 272 N. Y. S. 822.

First Nat. Bank of Wilkes-Barre vs. Barnum, 160 F. 245.

These definitions indicate that wages are paid by the employer—not by any third person—outside the contract of employment. The word tips or gratuities does not appear.

TIPS

Judge Sibley in the opinion passes the question by the simple assertion,

“We are not concerned with the proper meaning of the (tip) word, but with the legal status of what the passengers paid their Red Caps by whatever name called”. (R-217).

To be not concerned with the meaning of the word tip in relation to the mandatory provision of the Fair Labor Standards Act to pay wages, is to ascribe to Congress the remarkable conclusion,

“That a Congressman in 1938 was not familiar with the tipping practice.”

Pickett vs. Union Terminal, 33 F. Supp. 244.

Petitioners contend the general rule of construction to be;

“That words should be given their usual and ordinary meanings, unless the contrary clearly appears from the circumstance in which they are used.” (R-221) Dissenting opinion of Judge Holmes.

The opinion of the Circuit Court of Appeals (R-214) is contra to the adjudicated cases which

hold that the burden is on the employer to show a clear agreement by his employee to turn the tips over to him.

In *Polites vs. Barlin* (Ky. 1912) 147 S. W. 829, it was held tips "were a personal gift to (employee) and he and not appellant was entitled to receive them." This is likewise held in *Zappas v. Roumeliote*, 156 Iowa 709, 137 N. W. 935 and *McRae vs. McBeath*, 5 N. B. 446;

In *Gay vs. Paige* (1907), 150 Mich. 463, 114 N. W. 217, "a superintendent was entitled to "a mere gratuity for his services, after they had been rendered without any expectation or understanding as to reward."

In *Aetna Insurance Company vs. Church* (1871), 21 Ohio St. 492, it was held, an insurance company could not recover from its agent, mere gratuities paid to him by other companies which, instead of adjusting loss by fire for themselves, accepted adjustments made by the agent for his own company.

The several cases in which ownership of tips, have been adjudicated, hold no more than that;

a tip is a matter of contractual relation between the parties and belong to the donee unless the contrary appears.

By the stipulation of the parties (R-47), it is agreed that the Red Caps were employees of the Terminal Company as defined by the Fair Labor Standards Act of July 10, 1937, which is more than

~~before~~
a year ~~after~~ the effective date of the Fair Labor Standards Act.

The contract with the Red Caps was, that the Red Caps were to receive the tips and gratuities from the passengers as their property and wages. To change this contract and enter into a new contract required the operation of one of the fundamental principles of the law of contracts, that is, the meeting of the minds of the parties contracting.

This record shows that July 10th, 1937, (R-47) including the 24th day of October, 1938, the effective date of the Fair Labor Standards Act, until the bringing of the suit in the District Court below, the Red Caps never consented to accept any change in this contractual relation. There was never any attempt by the Terminal Company to assert that the notice contained any such change until after the institution of this suit.

Prior to the effective date of the Fair Labor Standards Act and the posting of the notice (R-10) by the Terminal Company, the Terminal Company never contended that it had any right in or to the ownership of the *tips*. The guarantee and accounting was devised by the Terminal Company not to comply with the terms of the Act but to evade as well as avoid the payment of the minimum wage.

CONCLUSION

Petitioners respectfully submit in conclusion that

(1) the tips were the property of the Red Caps by the express or implied contract of employment;

(2) that no change of the contract of employment in regard to the payment of wage could be forced upon the Red Caps by the unilateral action of the Terminal Company and against their consent;

(3) that the Fair Labor Standards Act did not ipso facto cancel the contract of employment of the Red Caps with the Terminal Company and convert the property of the Red Caps (tips) into wages paid by the employer as required by the Act;

(4) That after the final amendment of the collective bargaining agreement was entered into after 21 months of negotiations wherein the wages of the Red Caps were finally agreed upon—the Terminal Company should not be allowed to assert any rights or claims under the notice served October 24th, 1938, and in this manner violate the mandatory provisions in the Railway Labor Act and the Fair Labor Standards Act.

Wherefore, your petitioners respectfully pray that this Court will grant its writ of certiorari so that the Judgment of the Circuit Court of Appeals may be reversed and this cause remanded to the United States District Court of the Southern District of Florida for the entry of an order granting

plaintiffs' motion for summary judgment and the relief sought by plaintiffs against defendant or such other relief as this Court may consider proper in view of the facts and law as presented.

Respectfully submitted,

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Jacksonville, Florida.

Solicitor for Appellants.

MONTAGUE ROSENBERG,

Jacksonville, Florida,
of Counsel.

2. FREE COPY

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JACKSONVILLE, FLA.

**IN THE
SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, 1941

No. 112

C. L. WILLIAMS, Individually and as duly
Appointed and authorized agent and
representative for, HERBERT AIKEN,
et al.,

Petitioner,

— VS —

JACKSONVILLE TERMINAL COMPANY,
a corporation,

Respondent.

BRIEF FOR PETITIONER,

C. L. Williams, Etc.

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SUBJECT INDEX

	Page
STATEMENT OF FACTS	2
OFFICIAL REPORTS OF OPINIONS IN COURTS BELOW	12, 13
JURISDICTION	13
QUESTIONS PRESENTED	13
STATUTES INVOLVED	15
SPECIFICATIONS OF ERRORS TO BE URGED	18
SUMMARY OF ARGUMENT	20
ARGUMENT	21
CONCLUSION	36

TABLE OF CASES

	Page
Aetna Insurance Company vs. Church (1871), 21 Ohio St. 492	33
Colver vs. Foster Screen Company, 99 N. J. Eq. 734	31
First National Bank of Wilkes-Barre vs. Barnum, 160 Fed. 245	31
Gay vs. Hudson, 178 Fed. 499, 503	31
Gay vs. Paige (1907), 150 Mich. 463, 114 N. W. 217	33
Gurewitz (2 Cir.), 121 Fed. 982	30
La Juett vs. Coty Machine Company, 272 N. Y. S. 822	31
McRae vs. McBeath (1847), 5 N. B. 446	33
Roberts vs. Frank Carruthers & Bros. (Ky.) 1918, 202 S. W. 659, 661	31
Pickett vs. Union Terminal Company, 33 Fed. Supp. 244	11 - 32
Polites vs. Barlin (Ky. 1912), 147 S. W. 829	32
Zappas vs. Roumeliote (Iowa, 1912) 137 N. W. 935	32

STATUTES CITED

	Page
Fair Labor Standards Act of 1938, 29 U. S. C. A., 201-216 (June 25, 1938), 52 Statutes 1060 Chapter 676 Paragraph 16	2, 4, 5, 15, 29, 35, 36
Railway Labor Act Section 156, Title 45, United States Code Section 156, Volume 10-A Fed- eral Code Annotated Page 216	15, 17, 21, 22, 25

TEXT BOOK AUTHORITIES CITED

	Page
67 Corpus Juris 284.....	31

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— VS —

JACKSONVILLE TERMINAL COMPANY,
a corporation,

Respondent.

BRIEF FOR PETITIONER

STATEMENT OF FACTS

The parties in the brief will be referred to by their designation in the lower Court, that is, petitioner as plaintiffs and respondent as defendant.

Plaintiffs seek to reverse summary judgment entered by the Honorable Curtis L. Waller, Judge of the Jacksonville Division of the United States District Court, Southern District of Florida, on the 21st day of October, 1940, in an action under the Fair Labor Standards Act of 1938, 29 U. S. C. A. 201-216, (June 25, 1938), Chapter 676, Paragraph 1, 52 Stat. 1060, for unpaid wages and liquidated damages.

Plaintiffs and defendant each moved the District Court for summary judgment upon the pleadings, depositions and affidavits of each of the parties. Upon rendition of the summary judgment plaintiffs moved for a new trial, which was denied by the same Court on the 6th day of November, 1940.

Thereafter, plaintiffs below perfected their appeal from the District Court of the United States for the Southern District of Florida to the United States Circuit of Appeals, Fifth Circuit, and on March 4th, 1941, the said Circuit Court of Appeals affirmed the judgment of the lower District Court (R. 214), Judge Holmes dissenting (R. 221).

The complaint alleged that as the employer was engaged in Interstate Commerce and the work required of the plaintiffs was also Interstate Commerce, the defendant was required by said Act to pay plaintiffs the minimum wages as required by Section 6 (a) of said Act, of not less than twenty-five cents per hour from October 24th, 1938, to October 23rd, 1939, and thirty cents from the last mentioned date to June 30th, 1940, (R. 4).

July 1st, 1940, the plaintiffs were "put on the minimum rate of \$2.40 for eight hours" (R. 64) (R. 87) and on August 1st, 1940, a definite final agreement made the minimum wage established by the "Hours and Wage Law" the rate of pay for plaintiffs (R. 134). The complaint alleged the neglect or refusal of the defendant to pay the minimum wage prescribed by the Act and asked for liquidated damages and attorneys fees as provided by the Fair Labor Standards Act.

The defendant answered denying that it had violated the Fair Labor Standards Act in refusing to pay the minimum wage, to which answer was attached a bill of particulars. The answer further alleged and admitted that the plaintiffs, (Red Caps), by a ruling of the Interstate Commerce Commission, dated September 28th, 1938, had been designated as employees under the Railway Labor Act, (R. 9).

The parties stipulated (R. 47):

That both the petitioner and respondent were engaged in Interstate Commerce.

That the plaintiffs were employees of the defendant from July 10th, 1937, to the date of filing the bill of complaint as defined by the Fair Labor Standards Act.

That the bill of particulars attached to defendant's answer was a true statement of the number of hours worked by each of the plaintiffs, the amount received by each of the plaintiffs from the passengers, and the amount paid to each of the plaintiffs by the defendant by check drawn against the funds of the defendant.

Plaintiffs, had been employed by the Jacksonville Terminal Company as Red Caps, for many years under an agreement whereby they were required among other duties, "in handling of hand baggage and traveling effects of passengers or otherwise assisting them (passengers) at or about stations or destinations" (defendant's answer (R. 10, Par. 8)) to report at the Terminal at certain designated times, to meet certain trains, to take off certain passengers from the trains and to generally assist passengers using the Terminals in and about the trains, stations and taxicabs. The sole compensation was

the tips or gratuities received from the public.

The Red Caps were not permitted, under penalty of dismissal, to ask for tips or gratuities but were required to furnish the service gratis. The Terminal Company paid the Red Caps nothing.

July 10th, 1937, a proceeding was started in the Interstate Commerce Commission (R. 9) for the purpose of classifying the Red Caps as employees of the Terminal Company; September 29th, 1938, the Interstate Commerce Commission ruled the Red Caps were employees within the definition contained in the Railway Labor Act as amended.

Thereupon, L. L. Wooten, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, etc., on October 25th, 1938, wrote defendant, Jacksonville Terminal Company, (R. 94) to the effect that the Red Caps at the Jacksonville Terminal were covered "by the scope rule of our agreement all other rules covering group 3 are applicable" (R. 166) and requesting the advice as to the position of the Terminal Company.

October 24th, 1938,—the effective date of the Fair Labor Standards Act, the Terminal Company notified the Red Caps (defendant's answer (R-10, Par. 8 and R-121)) that they would be required to report daily the tips or remuneration received for the services ren-

dered passengers. The notice contained a guarantee of compensation, including the tips received, of not less than the minimum wage required by law. This arrangement being now designated by all parties as the *accounting and guarantee plan*.

Mr. J. L. Wilkes, President-General Manager of the defendant, Jacksonville Terminal Company, on October 27th, 1938, (R. 122) acknowledged receipt of Wooten's notice in a letter in which the Terminal Company, challenged Wooten's right to represent and denied the statement that the Red Caps were covered by the agreement of February, 1937, (R-166).

November 4th, a conference was held in Jacksonville, Florida, between Wooten, representing the plaintiff Red Caps, and Wilkes, representing the Terminal Company — from that date on, The Brotherhood's (represented by Wooten,) right to negotiate for the Red Caps (R-61 and R-62), and his contention that the Red Caps were covered or included in the agreement of February, 1937, (R-94 and 166) was not again denied, challenged or controverted by the Terminal Company.

Beginning with a letter of October 25th, 1938, through June 16th, 1939, Wooten in his representative capacity made twelve or more additional written requests for the entering into of a supplemental agreement to the col-

lective bargaining agreement of February, 1937, (R-94, 96, 97, 98 and 99). November 30th, 1938, (R-98) Wooten forwarded a proposed agreement (R-136) of the result of a previous conference, which proposed agreement (R-138) included a memorandum containing eight definite rules agreed upon (R-98 and 99) as the first amendment to the collective bargaining agreement claimed by Wooten, in his representative capacity to cover the Red Caps. This agreement in Paragraph 9 contained a specific rule requiring the minimum wage under the Fair Labor Standards Act to be paid the Red Caps. The Terminal Company refused to accept this agreement. However, during the month of June, 1939, a similar agreement was actually entered into by Wilkes on behalf of the Terminal Company and Wooten on behalf of the Red Caps (R-107), which was the first amendment to the collective bargaining agreement of February, 1937. August 9, 1940, (R-134) the agreement effective June 16th, 1939 (R-107) was amended, which agreement in paragraphs 1 and 2 thereof finally and definitely set a wage rule and was the second amendment of the collective bargaining agreement of February, 1937, which agreement Wooten definitely contended throughout the period of negotiations, from his letter of October 25th, 1938, to June 16th, 1939, was the collective bargaining agreement under which the Red

Caps were then working. With the exception of the letter of Wilkes, as representative of the defendant, Terminal Company, to Wooten of October 27th, 1938, (R-122) there is no challenge in the record that this agreement of February, 1937, (R-166) was not the collective bargaining agreement under which the Red Caps were working.

The tentative or proposed supplemental agreement tendered Wilkes on November 30th, 1938, (R-138) was taken paragraph by paragraph from this agreement of February, 1937, (R-166); which Wooten always contended covered the Red Caps. The agreement entered into the following June, 1939, (R-107) was, with the elimination of paragraph 9, practically the same agreement as the proposed agreement of November 30th, 1938, (R-138) and the original agreement of February, 1937, (R-166).

To the many requests of Wooten to the defendant, Terminal Company, for a definite settlement of the controversy raised by the letter of Wooten to the defendant, Terminal Company, dated October 25th, 1938, (R-93) and Wilkes' reply thereto of October 27th, 1938, (R-122) there are five letters from the Terminal Company, none of which challenge the contention of Wooten that the Red Caps were covered by the collective bargaining agreement of February, 1937, (R-166), but

each of which sought to postpone the final determination of the question of wages—which include the question of whether or not tips could or should be included in a wage to be paid by the Terminal Company under the Fair Labor Standards Act.

The plaintiffs refused to accept the conditions set forth in the notice of October 24th, 1938, (Plaintiff's answer, page 8, (R-10 and R-121)) through their duly authorized and recognized representative, Wooten, continued to negotiate or attempt to reach an agreement concerning not only the working conditions but primarily the rate of pay.

The agreement effective June 16th, 1939, (R-107) specifically excluded the question of wages and it was either mutually agreed between Wooten representing the Red Caps and Wilkes representing the Terminal Company that

“we could negotiate all the rules except the wage rule and enter into an agreement to apply whatever was finally ruled on by the Wage and Hour Administrator with regard to the payment of wages (see plaintiffs, exhibit No. 11, (R-106 and 107)) and then withdraw the case from mediation, as I believe from our letters and conferences we are pretty well agreed on all the questions involved

except that of wages (Wooten's letter dated May 26th, 1939, (R-107))".

While the above mentioned negotiations were going on between the representatives of both parties the Red Caps were consistently reporting the amount of tips received from the passengers each day and likewise either retaining each and every the tips as they had theretofore done for the whole period of service or for the past 17 years or more.

Under the accounting and guarantee plan the Terminal Company neglected or failed, or refused to pay or make good the guarantee until required by a representative of the Wage and Hour Department who had checked its records to ascertain whether or not the Red Caps had received the money which the payrolls of the Terminal Company indicated had been paid them, R-66). The first money received by the Red Caps from defendant was subsequent to August 15th, 1939, at which time each of the Red Caps receiving any money, in signing a receipt therefor, retained and refused to forfeit or release any right to sue for any additional money that might be due under section 16 (b) of the Fair Labor Standards Act (R-165).

Even after the agreement (R-166) effective June 16th, 1939, was entered into, wages having been expressly excluded therefrom, it was mutually understood by Wooten, repre-

senting the Red Caps and Wilkes, representing the Terminal Company, that the question of tips as wages, was a matter for determination either by the Administrator of the Act or by some Court of competent jurisdiction. October 12th, 1939, the Administrator of the Fair Labor Standards Act, acting through one Gustave Peck, (R-164) after a hearing refused to rule on the validity of the accounting and guarantee arrangement as being a compliance with the Fair Labor Standards Act and specifically recommended the matter be determined by a Court of competent jurisdiction.

Between October 12th, 1939, and March, 1940, there was either pending or in process of being instituted several suits involving the accounting and guarantee plan (R-81 and 82). March 7th, 1940, a suit was instituted in the District Court of the United States for the Northern District of Texas, entitled "A. J. Pickett, etc., et al. vs. Union Terminal Company", which suit terminated in the District Court in favor of the Red Caps. Upon rendition of that judgment further conferences were had between Wooten, representing the Red Caps, and Wilkes, representing the Terminal Company, and upon refusal of the Terminal Company to compensate the Red Caps other than by the accounting and guarantee system, above outlined, this action was commenced.

In short (R-83 and 84):

"Q. Back of July 1, 1940, to the effective date of the act, was there any agreement or understanding between you and Mr. Wilkes that this accounting and guarantee system would be the amount that these men would receive under the Fair Labor Standards Act?

A. No, sir.

Q. In other words, the whole thing was under negotiation at all times, and no definite agreement was ever entered into as to the rate of pay of the men under this accounting and guarantee system until judicial determination of that wage question was made?

A. I have already stated that it was a dispute existing under the terms of the amended Railway Labor Act affecting the wages of these Red Caps.

Q. Then you never accepted this guarantee and the accounting system on behalf of the Red Caps at all?

A. No, sir."

OFFICIAL REPORTS OF OPINIONS IN COURTS BELOW

A summary judgment was entered by the United States District Court in and for the Southern District of Florida containing

written findings of fact and conclusions of law reported in the record at pages 195 through 203, the cases cited being reported in 35 Federal Supplement 267.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit will be found at pages 214 through 222 of the record and being reported in 118 Federal (2nd) 324.

JURISDICTION

The jurisdiction of this Court is invoked under Section 340 (a) of the Judicial Code as amended by the Act of February 13th, 1925, c. 229, Section 1, 43 Stat. 938, U. S. C. A. Title 28, Section 347 (a).

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit sought to be reviewed was entered on the 4th day of March 1941, (R-214).

QUESTIONS PRESENTED

1. Whether or not a Terminal Company subject to the Railway Labor Act and the Fair Labor Standards Act employing Red Caps also covered by the terms of said acts, will be permitted to violate section 156 of Railway Labor Act and assert any right or privilege under the unilateral action of serving notice upon said employee to report tips

and gratuities received from the passengers, for the purpose of using tips reported as payment in whole or in part of minimum wage required by the Fair Labor Standards Act after (1) more than 20 months of abandonment of the conditions attempted to be imposed by said notice, (2) recognition of a collective bargaining agreement between said Terminal Company and said Red Caps and (3) 20 months of negotiations relative to the modification of the collective bargaining agreement so recognized and the settlement of the identical matters, to-wit, wages and working conditions which were attempted to be changed by said notice.

2. Under the facts in the preceding question, has a Railroad Terminal Company, which prior to the effective date of the Fair Labor Standards Act employed Red Caps at its Terminal under a plan by which the Red Caps received no compensation from the employer other than the right to retain all tips and gratuities received from passengers, complied with Section 6 of the Fair Labor Standards Act by the serving of a notice upon the Red Caps that from the effective date of the Fair Labor Standards Act requiring the employees (Red Caps) to report all tips and gratuities so received and guarantees to said Red Caps the payment of the difference between the tips and gratuities so re-

ported and the minimum wage required by the Fair Labor Standards Act of 1938.

3. Whether or not the mandatory provision of Section 6, of the Fair Labor Standards Act, is satisfied by the application of tips or gratuities received by Red Caps from passengers as payment in whole or in part of the minimum mandatory wage required by said Act to be paid to the employees (Red Caps) by the employer (Terminal Company).

STATUTES INVOLVED

The statutes involved are Sections 3 (m), 6 (a) and 11 (c) of the Fair Labor Standards Act of 1938, c. 676; Sections 3 (m), 6 (a) and 11 (c), 52 Stat. 1060, U. S. C. A., Title 29; Sections 203 (m), 206 (a) and 211 (c), and Section 2 of the Railway Labor Act, as amended, c. 347; Section 2, 44 Stat. 577, as amended June 21, 1934, c. 691; Section 2, 48 Stat. 1186, U. S. C. A., Title 45, Section 152.

The provisions of the Fair Labor Standards Act of 1938 primarily involved are:

* * *

Section 3. As used in this chapter—

“(m). ‘Wage’ paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board,

lodging, or other facilities, are customarily furnished by such employer to his employees."

Section 6.

"(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

"(1) during the first year from the effective date of this section, not less than 25 cents an hour.

"(2) during the next six years from such date, not less than 30 cents an hour."

* * *

Section 11.

"(c) Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder."

Section 156 of the Railway Labor Act says:

"156. Procedure in changing rates of pay, rules, or working conditions.—Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act (Par. 155 of this title), by the Mediation Board, unless a period of ten days has elapsed after termination of conference without request for or proffer of the services of the Mediation Board. (May 20, 1926, c. 347, Par. 6, 44 Stat. 582; June 21, 1934, c. 69, Par 6, 48 Stat. 1197)." 45 U. S. C. Sect. 156.

SPECIFICATIONS OF ERRORS TO BE URGED

The Court below erred:

1. In holding that the Railroad may by its own fiat disregard its existing bargaining agreement with Red Caps and pending negotiations with their accredited representative, by its own unilateral action effect a change in the rates of pay and working conditions in the face of a continued series of protests and refusals to consent.

2. In holding that the Fair Labor Standards Act operated to give to the Railroad the property of its employees Red Caps in the nature of their tips; the gifts and gratuities to them from the general public.

3. In holding that the Railroad's notice to the Red Caps was sufficient in law to sustain the appropriation of the tips by the Terminal Company which had always been the property of the Red Caps by the contract of employment the property of the Railroad, despite the failure of the notice to assert ownership of the tips.

4. By holding that because the employer became liable to pay a wage, a tip from the public became a charge — which the railroad never imposed for Red Caps service — irrespective of the Railroad's right to so impose a charge — either before or after enactment of Fair Labor Standards Act.

5. By holding that a member of the general public, in giving a tip, had his donation converted into a payment of a charge irrespective of his intention and despite the fact that there was no charge — because of the Railroad's absolute obligation to pay its employees a stated wage.

6. In holding that because the Fair Labor Standards Act made the Railroads owe the employees wages, that said Act operated to require the tipping public to pay these wages.

7. In holding that tips were not personal gifts of the passengers to the Red Cap employees but charges paid the agent of the employer despite conceded gratuitous character of tips over a 17 year period by employer and employee and despite the employer's standing instructions that an employee must not demand a charge or tip for service which instruction remained unchanged by the notice.

8. By holding that the Railroad could assert that its notice imposed a condition of employment, despite the Railroad's clear abandonment and waiver thereof; and despite the Railroad's execution of a collective bargaining agreement silent on wages and rates of pay for the admitted purpose of awaiting an authoritative determination of the Red Caps' right to and ownership of tips.

SUMMARY OF ARGUMENT

FIRST PROPOSITION: Whether or not the notice of the defendant to the plaintiffs, posted October 24th, 1938, (R-10, 121, 155) had any validity whatsoever in law or in fact after complete abandonment by both parties and the very matter, to-wit, wages of the Red Caps being negotiated and finally settled some eighteen months subsequent to the delivery and posting of said notice.

SECOND PROPOSITION: Whether or not tips or gratuities received by the Red Caps from passengers under a contract with the employer that such tips and gratuities so received constituted their compensation could by a unilateral action be appropriated by the defendant, Terminal Company, against the consent of the employees and used by the defendant, Terminal Company, as a part payment of the minimum mandatory wage required by the Fair Labor Standards Act to be paid by the employer (Terminal Company) to the employees (Red Caps).

ARGUMENT

Whether or Not the Notice of the Defendant to the Plaintiff Posted October 24th, 1938, (R. 10, 121, 155) Had Any Validity Whatsoever in Law or in Fact After Complete Abandonment by Both Parties and the Very Matter, To-Wit, Wages of the Red Caps Being Negotiated and Finally Settled Some Eighteen Months Subsequent to the Delivery and Posting of Said Notice.

This proposition will be, in this brief, treated under two questions:

First: The effect of the notice to the Plaintiff under section 156 of the Railway Labor Act.

Second: The consideration given the notice by the Terminal Company and the Red Caps.

First: The Effect of the Notice to the Plaintiffs Under Section 156 of the Railway Act.

Approximately one month before the effective date of the Fair Labor Standards Act, the Interstate Commerce Commission by its ruling determined the status of the Red Caps as *employees* covered by the Railway Labor Act. All other status, titles, designations, or ideas, such as licensees of the Terminal Company, or even trespassers — ceased. They were employees.

By continuing to allow the Red Caps to receive tips and gratuities from the passengers as their compensation, the Terminal Company ratified or confirmed the contractual relations regarding the right to and ownership of tips as being the property of the Red Caps, or in other words, their wages for the work performed for the company. It was at this time September 28th, 1938, that the Terminal Company may have made a new agreement — not after effective date of the Fair Labor Standards Act — for the agreement of February, 1937, was then effective and no change could be made without violation of Section 156 of the Railway Labor Act.

October 25th, 1938, Wooten, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees advised the Terminal Company, the Brotherhood had jurisdiction over the Red Caps and that their agreement of February, 1937, covered the Red Caps. October 27th, 1938, the Terminal Company challenged both this jurisdiction and this coverage claimed by Wooten:

But the right of the Brotherhood to represent under, and the coverage of the Red Caps by, the then existing collective bargaining agreement of February, 1937, (R-166), was at the conference of November 4th, 1938, between two representatives of the parties,

forever settled.

"A. Mr. Wooten has done all the bargaining and consulting with me in regard to the Red Caps, although I have not at all times agreed with his conclusions. Mr. Wooten has come to see me in regard to the Red Caps." (R-61).

The only authority Wooten had to treat with Wilkes for the Red Caps was the collective bargaining agreement of February, 1937. Wilkes could not receive him as agent of the Red Caps with his fingers crossed as to the authority to represent.

The Terminal Company's recognition of Wooten and its subsequent failure to challenge the coverage of the Red Caps by the agreement of February 17th, 1937, until after the institution of this suit leaves the inescapable conclusion that each of the parties considered that this agreement covered these Red Caps from the date of the ruling of the Interstate Commerce Commission.

On November 30th, 1938, Mr. Wooten submitted an amendment to this February, 1937, agreement, which was not acceptable to the defendant, (R. 138-147). Negotiations continued and June 16th, 1939, (R. 107 to 116) an agreement was entered into which is substantially the same as the agreement submitted on November 30th, 1938, (R. 138) but

by agreement, silent as to wages. In both of these amendments paragraph after paragraph was taken from the February 1st, 1937, (R. 166) agreement, such paragraphs incorporated without change in the final agreement effective June 16th, 1939. This agreement was subsequently amended as to rates of pay subsequent to August 1st, 1940, (R. 133 and 134). "

The collective bargaining agreement of February 1st, 1937, and the subsequent amendments thereto, is the collective bargaining agreement which Section 156 of the Railway Labor Act prevented the Terminal Company from altering and held status quo the right of the Red Caps to the tips and gratuities received from the passengers.

The simple words of the layman, Wooten to Wilkes (R. 97) in the letter of November 26th, 1938;

"We have advised you that we will expect the terms of our existing agreement to apply to the Red Caps until such time as changes might be made."

was never by any subsequent word or action, contradicted or challenged but was by the subsequent negotiations ratified and confirmed.

The Terminal Company had no right under the Railway Labor Act, to appropriate for its

use the tips reported by the employees and thereby attempting to change the existing agreement as to wages without a direct violation of Section 156 of the Railway Labor Act. To condone such a proposition the whole effect of the Railway Labor Act will be stultified and emasculated. Can the defendant say—yes, we negotiate—and afterwards say, but we cannot by such negotiations be bound because by unilateral action, we posted a notice which we now assert imposed a condition which you could take or leave—notwithstanding your existing bargaining agreement; notwithstanding its recognition by us; notwithstanding our continued negotiations with you; notwithstanding our duty to deal with one entity in one way alone—your bargaining agent—we will insist that we deal with you individually—impose a condition of contract and thus we avoid the effect of both the Railway Labor Act and the mandatory provision of the Fair Labor Standards Act.

Second: The Consideration of the Notice by the Terminal Company and the Red Caps.

The Red Caps did not accept the terms of the notice as appropriation by the Terminal Company of the tips or gratuities to pay in part or in whole, the wage that they were entitled to under the Fair Labor Standards Act.

To the contrary the next day after the effective date of the Act, which was also the date of the notice, Mr. Wooten, representing the Red Caps, asked for the first conference concerning the very matters contained in the notice.

From this date to within two or three weeks prior to the filing of this suit, there was a continued attempt, request and demand by Wooten upon Wilkes, and conferences and negotiations between Wooten for the Red Caps and Wilkes for the Terminal Company, to consider the question of wages, and the relation of tips to wages, Wooten contending at all times that tips were property of the Red Caps.

The Terminal Company in the notice did not assert ownership of the tips but specifically continued to the Red Caps, the privilege to retain their tips. (Its representative, Mr. Wilkes, never contending that tips were wages, his whole attitude being that the plan was one of substitution until some judicial determination was rendered adjudicating the validity of the plan).

His whole action, attitude towards, and consideration of this question was one of delay.

"My people wish to see what ruling will be on tips before we can agree to wage rates." (R-128).

This quoted matter appears in the letter, Plaintiffs' Exhibit 24, from Wilkes to Wooten, dated March 4, 1939, and again,

"This question * * has been carefully considered by this company and its owning carriers. Several suits * * * seem to have the same main question of issue as is involved here, i. e. whether tips can be considered wages." (R-136).

This quotation being in Plaintiffs' Exhibit 31, letter from Wilkes to Wooten, dated August 14, 1940.

October 25th, 1938, Wooten advised the Terminal Company that the bargaining agreement of February, 1937, covered the men and requested a conference (R-10). Negotiations and conferences continued and it was recognized by both sides that there was an existing dispute as to wages and hours. By these negotiations the Terminal Company clearly abandoned and waived any effect sought to be given the notice and never claimed or pretended to claim ownership of the tips.

The Terminal Company did not further consider the notice and plan suggested as in operation, for it neglected or refused to pay any amounts guaranteed by the notice until the latter part of July or the middle of August, 1939, (R-67-68) and after payment of a settlement the Terminal Company ac-

cepted the receipt of the Red Caps originating in the Wage and Hour Department at Washington (R-66), in which receipt (R-165) the following matter was incorporated:

"it is my understanding that by signing this receipt I do not forfeit or release my right to sue for such additional amount as may be due under Section 16 (b) of the Act." (R.-165).

The Terminal Company paid no tax on the tips reported; but paid only on the amounts they actually paid the Red Caps. (R-70).

This abandonment in fact and the waiver of any rights under the notice by the Terminal Company by its subsequent conduct, and retention by Red Caps of their right to assert a claim for back wages under the Fair Labor Standards Act, clearly indicated that neither the Red Caps nor the Terminal Company considered the notice as having any legal or factual validity.

Not until the first hearing on the motions for summary judgment in the District Court was this ownership of the tips by the Terminal Company first asserted and then only as a construction of counsel. That construction is not supported by the record.

The refusal of the Red Caps to accept the notice; the abandonment of the notice by the Terminal Company; the subsequent joint ne-

gotiations and conferences by the parties regarding the very matter; tips in relation to wage contained in the notice can permit but one construction, i. e. no final determination; no effect whatever; a nullity.

And the blunt fact remains that the employer has not paid the minimum wage that the Fair Labor Standards Act requires every employer shall pay.

Whether or Not the Mandatory Provision of Section 6, of the Fair Labor Standards Act, is Satisfied by the Application of Tips or Gratuities Received by Red Caps from Passengers as Payment in Whole or in Part of the Minimum Mandatory Wage Required by Said Act to be Paid to the Employer (Terminal Company).

Section 206 of the Fair Labor Standards Act, 1938, says:

“(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates.”

We are dealing here only with Fair Labor Standards Act and not any other Act, statute or ruling of any commission. It is the mandatory requirement of the act “that the employer shall pay.” The act contains no word, or words, or phrases suggesting any guaran-

tee of payment. So that no substitute could be used to avoid the effect of this mandatory provision, Congress saw fit to make one exception, that is, to allow board, lodging, and other facilities to be considered as part of the wages to be paid.

To prevent abuse of this exception, the manner of ascertaining the money value of such board and lodging and other facilities to be determined solely by the Administrator of the act.

This we submit, is the only manner in which the Terminal Company or any other employer could substitute anything of value as part of the wage mandatorily required to be paid.

"I think that if Congress had intended that tips be included in the meaning of the word wages, it would have said so."
Dissenting opinion of Judge Holmes.
(R.-121).

The adjudicated cases definitely hold that;

Wages are the reward paid for labor; a compensation given to a hired person for his or her services.

In Re: Gurewitz (2 Cir.) 121 F. 982;

"Both salary and wages are terms invariably used in defining the consideration which an *employer bestows* upon one who is serving him in consideration of his

services, and is never applied in describing the gain, profit or recompense which accrued to one who is conducting a business of his own and upon his own account."

See also:

Roberts vs. Frank Carruthers & Bros.
(Ky.) 1918, 202 S. W. 659, 661.

Gay vs. Hudson, 178 F. 499, 503, citing
Moore vs. Heaney, 14 Md. 558.

67 C. J. 284.

Colver vs. Foster Screen Co., 99 N. J.
Eq. 734.

La Juett vs. Coty Machine Company, 272
N. Y. S. 822.

First Nat. Bank of Wilkes-Barre vs. Bar-
num, 160 F. 245.

These definitions indicate that wages are paid by the employer—not by any third person—outside the contract of employment. The word tips or gratuities does not appear.

TIPS

Judge Sibley in the opinion passes the question by the simple assertion,

"We are not concerned with the proper meaning of the (tip) word, but with the

legal status of what the passengers paid their Red Caps by whatever name called". (R-217).

To be not concerned with the meaning of the word tip in relation to the mandatory provision of the Fair Labor Standards Act to pay wages, is to ascribe to Congress the remarkable conclusion,

"That a Congressman in 1938 was not familiar with the tipping practice."

Pickett vs. Union Terminal, 33 F. Supp. 244.

Petitioners contend the general rule of construction to be;

"That words should be given their usual and ordinary meanings, unless the contrary clearly appears from the circumstance in which they are used." (R-221)

Dissenting opinion of Judge Holmes.

The opinion of the Circuit Court of Appeals (R-214) is contra to the adjudicated cases which hold that the burden is on the employer to show a clear agreement by his employee to turn the tips over to him.

In Polites vs. Barlin (Ky. 1912) 147 S. W. 829, it was held tips "were a personal gift to (employee) and he and not appellant was entitled to receive them." This is likewise held in Zappas v. Roumeliote, 156 Iowa, 709,

137 N. W. 935 and McRae vs. McBeath, 5 N. B. 446;

In Gay vs. Paige (1907), 150 Mich. 463, 114 N. W. 217, a superintendent was entitled to "a mere gratuity for his services, after they had been rendered without any expectation or understanding as to reward."

In Aetna Insurance Company vs. Church (1871), 21 Ohio St. 492, it was held, an insurance company could not recover from its agent mere gratuities paid to him by other companies which, instead of adjusting loss by fire for themselves, accepted adjustments made by the agent for his own company.

The several cases in which ownership of tips, have been adjudicated, hold no more than that;

a tip is a matter of contractual relation between the parties and belongs to the donee unless the contrary appears.

By the stipulation of the parties (R-47), it is agreed that the Red Caps were employees of the Terminal Company as defined by the Fair Labor Standards Act, as of July 10, 1937, which is more than a year prior to the effective date of the Fair Labor Standards Act.

The contract with the Red Caps was, that the Red Caps were to receive the tips and gratuities from the passengers as their prop-

erty. To change this contract and enter into a new contract required the operation of one of the fundamental principles of the law of contracts, that is, the meeting of the minds of the parties contracting.

This record shows that July 10th, 1937, (R-47) including the 24th day of October, 1938, the effective date of the Fair Labor Standards Act, until the bringing of the suit in the District Court below, the Red Caps never consented to accept any change in this contractual relation. There was never any attempt by the Terminal Company to assert that the notice contained any such change until after the institution of this suit.

Prior to the effective date of the Fair Labor Standards Act and the posting of the notice (R-10) by the Terminal Company, the Terminal Company never contended that it had any right in or to the ownership of the *tips*. The guarantee and accounting was devised by the Terminal Company not to comply with the terms of the Act but to evade as well as avoid the payment of the minimum wage.

Despite the provisions of the Fair Labor Standards Act, the stipulation of the parties (R-47), and the provisions of the Railway Labor Act and the finding of the Interstate Commerce Commission, ex parte number 72, (defendant's answer, Par. 6, (R-9)), the District Court held the Red Caps "were working

for themselves and the passengers whom they served and whose orders they obeyed" and that the Fair Labor Standards Act was satisfied in that the Terminal Company "furnished him the opportunity and the facilities wherein and wherewith to apply his trade" (R-201).

The Circuit Court of Appeals disregarded this view and held to the effect that the Fair Labor Standards Act, itself, operated to take away from the Red Caps their property (tips) and give to the Terminal Company all the tips paid the Red Caps after the effective date of the Fair Labor Standards Act for by operation of law the tips then became the property of the Terminal Company, which they had a right to include as wages to satisfy the Fair Labor Standards Act.

We respectfully submit that Judge Holmes in his dissenting opinion has placed the proper construction upon the Act, that is:

"The general rule is that words should be given their usual and ordinary meanings, unless the contrary clearly appears from the circumstances in which they are used." (R-221).

and had Congress wanted to include anything else under the head of wages which might be construed into an inclusion of tips received by an employee as a deduction from the legal wage provided for, it might have easily in-

cluded such additional words as "other remuneration" or "income from other sources" instead of the particular language used in Section 6 of the Fair Labor Standards Act, to-wit:

"Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates."

CONCLUSION

Petitioners respectfully submit in conclusion that:

(1) the tips were the property of the Red Caps by the express or implied contract of employment;

(2) no change of the contract of employment in regard to the payment of wage could be forced upon the Red Caps by the unilateral action of the Terminal Company and against their consent.

(3) the Fair Labor Standards Act did not ipso facto cancel the contract of employment of the Red Caps with the Terminal Company and convert the property of the Red Caps (tips) into wages paid by the employer as required by the Act;

(4) after the final amendment of the collective bargaining agreement was entered in-

to after 21 months of negotiations wherein the wages of the Red Caps were finally agreed upon—the Terminal Company should not be allowed to assert any rights or claims under the notice served October 24th, 1938, and in this manner violate the mandatory provisions in the Railway Labor Act and the Fair Labor Standards Act.

Wherefore, for the errors shown plaintiffs urge that the judgment of the Circuit Court of Appeals may be reversed and this cause remanded to the United States District Court for the Southern District of Florida for the entry of an order granting plaintiffs' motion for a summary judgment and the relief sought by plaintiffs against defendant, or so much thereof as this Court may consider proper in view of the facts and law as presented.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 112

C. L. WILLIAMS, Individually and
as duly appointed and authorized
agent and representative for
HERBERT AIKEN, et al.,

Petitioner

vs.

JACKSONVILLE TERMINAL COMPANY,
a corporation,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JULIAN HARTRIDGE

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INDEX

	Page
Statement	1
Conclusion	3

CITATIONS

A. J. Pickett, etc., et al., v. Union Terminal Company, 313 U. S., 85 Law Ed. 1003	2
Williams v. Jacksonville Terminal Company, 35 Fed. Supp. 267	2
Williams v. Jacksonville Terminal Company, 118 Fed. 2d 324	2
Union Terminal Company v. A. J. Pickett, 118 Fed. 2d 328	2

**SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, 1941

No. 112

C. L. WILLIAMS, Individually and
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HERBERT AIKEN, et al.,

Petitioner

vs.

JACKSONVILLE TERMINAL COMPANY,
a corporation,

Respondent

**BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI.**

STATEMENT.

Action instituted in the District Court of the United States for the Southern District of Florida by C. L. Williams, individually and as duly appointed and authorized agent and representative for Herbert Aiken, and others, against Jacksonville Terminal Company to recover unpaid wages and liquidated damages under Fair Labor Standards Act of 1938 ss 1-19 and 16(b), 29 U. S. C. A. ss 201-219, 216 (b).

No Statute except the Fair Labor Standards Act is cited or reference made in the pleadings.

A summary judgment was entered for the Defendant (R. 195); 35 Fed. Supp. 267. This judgment was affirmed March 4th, 1941, by the Circuit Court of Appeals, Fifth Circuit, (R. 214); 118 Fed. 2d 324.

On the same day the Circuit Court of Appeals, Fifth Circuit, reversed a judgment in favor of the Plaintiff in Union Terminal Company, Appellant, v. A. J. Pickett, etc., et al., Appellee; 118 Fed. 2d 328.

In the Picket case the Court said:

"This case is similar to Williams v. Jacksonville Terminal Company, 5 Cir., 118 F. 2d 324, this day decided, except that on a trial without a jury the district court reached an opposite conclusion and rendered a large judgment for wages and damages against Union Terminal Company. The facts are about the same and need not be restated. The applicable law is the same and requires a like decision.***

"Nothing specially urged in this case differentiates it from that of Jacksonville Terminal Company. The judgment is reversed and the case is remanded for further consistent proceedings."

Petition for Certiorari was filed and denied June 2nd, 1941. Supreme Court of the United States, October Term, 1940. No. 1023: A. J. Pickett, etc., et al., v. Union Terminal Company, 313 U. S., 85-Law Ed. 1003.

It does not appear from the Petition for Writ of Certiorari filed on behalf of C. L. Williams, in-

2

dividually, etc., et al., that there are special and important reasons therefor.

The Petition should be denied.

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RECEIVED a copy of the above
Brief this day of July,
A. D. 1941, and service accepted.

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Office - Supreme Court, U. S.
FILED
DEC 8 1941
CHARLES ELWELL GORLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1941.

No. 112.

C. L. WILLIAMS, individually and as duly appointed and
authorized agent and representative for **HERBERT**
AIKEN, et al., Petitioner,

v.

JACKSONVILLE TERMINAL COMPANY, a corporation,
Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT.**

**BRIEF FOR RESPONDENT, JACKSONVILLE
TERMINAL COMPANY.**

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DECEMBER 8, 1941.

TABLE OF CONTENTS.

	PAGE
OPINIONS BELOW.....	1
JURISDICTION.....	2
QUESTIONS PRESENTED.....	2
STATUTES INVOLVED.....	3
STATEMENT.....	6
I. HISTORY OF THE CASE.....	6
II. STATEMENT OF FACTS WITH RESPECT TO THE APPLICATION OF SO-CALLED "TIPS" ON PLAINTIFFS' WAGES.....	9
III. STATEMENT OF FACTS WITH RESPECT TO THE EFFECT OF THE RAILWAY LABOR ACT.....	22
INTRODUCTION TO ARGUMENT.....	49
SUMMARY OF ARGUMENT.....	56
ARGUMENT.....	60

I. THE DEFENDANT, AS EMPLOYER OF THE PLAINTIFF RED CAPS, WAS LEGALLY ENTITLED TO APPLY ON THE WAGES DUE FROM DEFENDANT TO THE PLAINTIFFS THE SUMS RECEIVED BY THE PLAINTIFFS FROM THE TRAVELING PUBLIC FOR SERVICES PERFORMED AS DEFENDANT'S EMPLOYEES IN THE COURSE OF SUCH EMPLOYMENT; AND THIS METHOD OF PAYMENT COMPLIED WITH THE REQUIREMENT OF SECTION 6 (a) OF THE FAIR LABOR STANDARDS ACT BECAUSE:

A. *Where Compensation is Received by an Employee From the Public for Services Performed as Such Employee in the Course of the Employment, the Employer and Not the Employee is Entitled to Such Compensation and May Direct and Control Its Disposition.....*

60

B. *Even if the Sums Received by Red Caps From the Traveling Public for Services Rendered in the Course of Their Employment Should be Treated Not as Compensation From the Public for Such Services, But as "Tips" or "Gratuities,"—Which They Were Not,—Nevertheless Where Tips or Gratuities Are Received by an Employee in the Course of, and Incidental to, His Employment, the Employer has the Legal Right to Control And Direct the Disposition of Such Gratuities And May Require Them to be Paid Over or Accounted For to Him.....*

68

C. Since the Defendant as Plaintiffs' Employer Was Lawfully Entitled to Control and Direct the Disposition of the Sums Received by the Plaintiffs From the Traveling Public Either as Compensation for Services Rendered in the Course of the Employment or as "Tips" or "Gratuities," Defendant Was Entitled, in the Absence of a Collective Agreement With the Plaintiffs to the Contrary, to Exercise Such Control and Alter the Disposition of Such Sums Without Obtaining Any Other Consent From the Plaintiffs Than was Implicit in Their Continuing to Work During Pay Periods After the Altered Disposition of Such Sums Had Been Notified to Them, and in Their Acceptance of the Benefits Conferred by Such Notice. 79

D. The Defendant, by Permitting the Plaintiffs as Its Employees to Retain as Their Own, Sums Over Which the Employer Had a Legal Right of Disposition and Control, and by Making up to the Plaintiffs Any Deficit Between Such Sums and the Minimum Statutory Wage, Has "Paid" Them in Accordance With the Requirements of Section 6 (a) of the Fair Labor Standards Act, and Such Payment Fully Complies With the Requirements of That Section as Reasonably and Properly Interpreted in the Light of the Policy and Intent of the Congress. 97

1. The Words in Which the Statutory Obligation to Pay Wages is Expressed, When Given Their Normal and Ordinary Legal Meaning, Do Not Require the Manual Delivery of Money Directly by the Employer to the Employee in Amounts Equal to the Statutory Wage Rates, Since on Principles of Common Law a Debt, and Hence a Wage, May be "Paid" Not Merely by the Delivery of Money, But Also by the Transfer to the Creditor of Certain Kinds of Claims Against Third Persons, Viz., Checks, if These Result in the Receipt of Money From Such Third Persons, and A Fortiori by Surrendering or Forgiving to the Creditor an Obligation to Account for Money Which the Creditor Owes to the Debtor. 100

2. It Was the Intent and Policy of the Congress, in Enacting the Minimum Wage Provisions of the Fair Labor Standards Act, to Require the Employer to Provide the Employee With Means Sufficient to Defray the Cost of a Minimum Standard of Decent Living; and the Minimum Wage Provisions of the Act Should be Construed According to That Intent, in Preference to a Construction Which Would Disregard the Intent of the Congress and Would Require the Employer to Pay the Employee at a Substantially Higher Rate Than That Fixed by the Act. 108

(a) The History of Minimum Wage Legislation Shows That the Purpose of Such Legislation Has Always Been to Insure to the Employee the Means Sufficient to Provide a Minimum Standard of Decent Living. . . . 112

(b) The Legislative History of the Fair Labor Standards Act, and the Face of the Act Itself, Show That Its Only Purpose Was to Insure to Workers the Means Sufficient to Meet the Cost of a Minimum Standard of Decent Living, and Not to Impose Additional Burdens on the Employer. 115

(c) Construction of the Minimum Wage Provisions of the Fair Labor Standards Act in Accordance With Its Purpose Makes it Clear That Payment to the Plaintiffs Under the Accounting and Guarantee Plan Was in Compliance With the Act; and Such a Construction is to be Preferred to the Plaintiffs' Construction, Which Would Disregard the Purpose of the Act and Would Result in the Payment of More Than the Minimum Wage Required by the Act. . . 122

3. *The Fact That Defendant's Construction of the Fair Labor Standards Act is in Accord With the Purpose of That Act is Confirmed by the Construction Given to Other Social Legislation, Whereby Tips Have Been Regarded as Equivalent to Wages Paid to the Employee by the Employer.* . . . 128

(a) Workmen's Compensation Acts. . . 128

(b) Federal Social Security Act. . . 132

(c) National Labor Relations Act. . . 134

(d) Railroad Retirement Act. . . 134

II. THE PROVISIONS OF SECTION 2, SEVENTH, AND SECTION 6 OF THE RAILWAY LABOR ACT, AS AMENDED, DO NOT SUPPORT THE CONCLUSION THAT THE DEFENDANT, IN PAYING WAGES TO THE PLAINTIFFS UNDER THE ACCOUNTING AND GUARANTEE PLAN, FAILED TO COMPLY WITH THE FAIR LABOR STANDARDS ACT. . . . 136

A. *Section 2, Seventh, and Section 6 of the Railway Labor Act Have Application Only to Changes in an Existing Collectively Bargained Agreement.* . . . 139

B. *There Was No Collectively-Bargained Agreement in Existence Between the Plaintiffs and the Defendant When the Plaintiffs Were Given Notice of the Accounting and Guarantee Plan on October 24, 1938.* . . . 142

C. <i>Even Assuming a Collectively Bargained Agreement Between the Plaintiffs and the Defendant to Have Been in Existence on October 24, 1938, the Notice of that Date, Instituting the Accounting and Guarantee Plan, Effected No Change Which Would Constitute a Violation of the Railway Labor Act</i>	152
1. <i>The Notice of October 24, 1938, Related to a Subject Not Covered by the Agreement of 1937 or by Any Other Collectively Bargained Agreement Respecting Red Caps</i>	153
2. <i>The Notice of October 24, 1938, Did Not Effectuate or Purport to Effectuate Any Change in the Manner in Which the Red Caps Had Received Their Wages Up to That Time, But Only Provided for the Payment to Them of Such Additional Sums as Might be Necessary to Bring Their Wages in All Instances Up to the Statutory Wage Prescribed by the Fair Labor Standards Act</i>	155
CONCLUSION	159

TABLE OF CASES.

	PAGE
Adkins v. Children's Hospital, 261 U. S. 525, 43 S. Ct. 394 (1922).....	112
Aetna Insurance Co. v. Church, 21 Ohio St. 492 (1872).....	76
Apex-Hosiery Co. v. Leader, 310 U. S. 469, 60 S. Ct. 982 (1940).....	120
Balfour Company v. Brown, 110 S. W. (2d) 104 (Tex. Civ. App., 1937).....	389
Bryant v. Pullman Co., 188 App. Div. 311, 177 N. Y. Supp. 488 (1919), aff'd without opinion, 228 N. Y. 579, 127 N. E. 909 (1920).....	72, 130
Donnellan v. Halsey, 114 N. J. L. 175, 176 Atl. 176 (1935).....	87
<i>Ex Parte</i> Farb., 178 Cal. 592, 174 Pac. 320 (1918).....	70
Federal Underwriters Exchange v. Husted, 94 S. W. (2d) 540 (Tex. Civ. App., 1936).....	131
Forsyth v. Reynolds, 15 Howard 358 (1853).....	62
Gay v. Paige, 150 Mich. 463, 114 N. W. 217 (1907).....	76
Gloyd v. The Hotel LaSalle Co., 221 Ill. App. 104 (1921).....	70
Gross' Case, 132 Me. 59, 160 Atl. 55 (1933).....	73, 131
Harrison v. Kansas City Terminal Ry. Co., 36 F. Supp. 434 (1941).....	6, 77
Hawaii v. Mankichi, 190 U. S. 197 (1903).....	109
Hudson & M. R. Co. Employees—Railway Labor Act, <i>Ex Parte</i> No. 72 (Sub-No. 1), 245 I. C. C. 415 (1941).....	10
<i>In re</i> Club Troika, 2 N. L. R. B. 90 (1936).....	134
<i>In re</i> Willard, 2 N. L. R. B. 1094 (1937).....	134
Kadison v. Gottlieb, 226 App. Div. 700, 233 N. Y. Supp. 485 (1929).....	130
King (The) v. St. John, 9 B. & C. 896, 109 Eng. Rep. 333 (1829).....	87
Kinney v. Mahoning Mills, 13 Pa. Superior Ct. 573 (1900).....	102
Leach v. Hannibal & St. Joseph R. Co., 86 Mo. 27 (1885).....	66
Lloyd's Casualty Co. v. Meredith, 63 S. W. (2d) 1051 (Tex. Civ. App., 1933).....	131
Macauley v. Press Publishing Co., 170 App. Div. 640, 155 N. Y. Supp. 1044 (1915).....	86
Marks v. Cowdin, 175 App. Div. 700, 162 N. Y. Supp. 567 (1916).....	86
M'Rae v. M'Beath, 5 N. B. 446 (1847).....	76
Morrison v. Thompson, L. R. 9 Q. B. 480 (1874).....	66
Ozawa v. United States, 260 U. S. 178, 43 S. Ct. 65 (1922).....	111
Painter v. Durham, 195 Ill. App. 468 (1915).....	87
Peniston v. John Huber Co., 196 Pa. 580, 46 Atl. 934 (1900).....	86
Picket <i>et al.</i> v. Union Terminal Co. of Dallas, 33 F. Supp. 244 (1940).....	53, 81
Polites v. Berlin, 149 Ky. 376, 149 S. W. 828 (1912).....	75
Powers' Case, 275 Mass. 515, 176 N. E. 621 (1931).....	70, 130
Princeton Coal Co. v. Dorth, 191 Ind. 615, 133 N. E. 386 (1921), rehearing denied, 191 Ind. 615, 134 N. E. 275 (1922).....	102
Regulations Concerning Employees under Railway Labor Act, <i>Ex Parte</i> No. 72 (Sub-No. 1), 229 I. C. C. 410 (1938).....	9

	PAGE
Reynolds v. Roosevelt, 55 Hun 610, 8 N. Y. Supp. 749 (1890)	66
Rochester Telephone Corporation v. United States, 307 U. S. 125, 59 S. Ct. 754 (1939)	10
Ryan v. The Denver Union Terminal Co., U. S. D. C., Dist. Colo. (decided July 17, 1941, not yet reported)	9
Shadoan v. Langdon, 195 Ky. 495, 242 S. W. 841 (1922)	102
Shannahan v. U. S., 303 U. S. 596, 58 Ct. 732 (1938)	10
Sheppard Publishing Co. v. Harkins, 9 Ontario L. R. 504 (1905)	66
Shuppan v. Peoria Ry. & Terminal Co., 30 F. (2d) 569 (1929)	87
Sloat v. Rochester Taxicab Co., 177 App. Div. 57, 163 N. Y. Supp. 904 (1917), aff'd without opinion, 221 N. Y. 491, 116 N. E. 1076 (1917)	70, 129
Smith v. Herring-Hall-Marvin Co., 115 N. Y. Supp. 204 (1909)	86
Spain v. Arrot, 2 Starkie 256, 171 Eng. Rep. 638 (1817)	87
State v. Angelo, 109 Miss. 624, 68 So. 918 (1915)	70
Stopher v. Cincinnati Union Terminal Co., 246 I. C. C. 41 (1941)	93
Taylor v. Pennsylvania-Reading Seashore Lines, Inc., U. S. D. C., E. Dist. Pa. (decided April 19, 1941, not yet reported)	7
Union Terminal Co. v. Pickett, 33 F. Supp. 244, 118 F. (2d) 328 (1941)	7
United States v. American Trucking Ass'ns, 310 U. S. 534, 60 S. Ct. 1059 (1940)	111, 126
United States v. City and County of San Francisco, 310 U. S. 16, 60 S. Ct. 749 (1940)	120
United States v. Stone & Downer Co., 274 U. S. 225, 47 S. Ct. 616 (1927)	111
Virginian Ry. Co. v. System Federation No. 40, 300 U. S. 515, 57 S. Ct. 592 (1937)	94, 141
Williams v. Jacksonville Terminal Company, 35 F. Supp. 267, 118 F. (2d) 324 (1941)	1
Zappas v. Roumiliote, 156 Iowa 709, 137 N. W. 935 (1912)	75

STATUTES.

Act of February 13, 1925, c. 22, 43 Stat. 938, U. S. C. Title 28, Section 347 (a), amending the Judicial Code	2
Fair Labor Standards Act of 1938, Act of June 25, 1938, c. 676, 52 Stat. 1060, U. S. C. Title 29, Section 201	3
Federal Social Security Act, Act of Aug. 14, 1935, c. 531, 49 Stat. 637, U. S. C. Title 42, Section 301	432
Railroad Retirement Act, Act of Aug. 25, 1935, c. 812, 49 Stat. 967, U. S. C. Title 45, Section 215, as amended by Act of June 24, 1937, c. 382, 50 Stat. 318, U. S. C. Title 45, Section 228a	134
Railroad Unemployment Insurance Act, Act of June 25, 1938, c. 680, 52 Stat. 1094, as amended by Act of June 20, 1939, c. 227, 53 Stat. 845, U. S. C. Title 45, Section 351	134
Railway Labor Act, Act of May 20, 1926, c. 347, 44 Stat. 577, as amended by Act of June 21, 1934, c. 691, 48 Stat. 1185, U. S. C. Title 45, Section 151	3

MISCELLANEOUS AUTHORITIES.

	PAGE
Brief of Mr. Felix Frankfurter, Counsel for the District of Columbia in <i>Adkins v. Children's Hospital</i> , 261 U. S. 525, 43 S. Ct. 394 (1922)	F12
C. C. H. Railroad Unemployment Insurance Service, Par. 9265, pp. 7375-76	135
1 C. C. H. Unemployment Insurance Service, Pars. Fed. 5204.271 (p. 2024), and 5704.015 (p. 2429)	133
Columbia Law Review, Vol. 40, p. 1262 (November, 1940) "Fair Labor Standards Act—Tips as Wages."	121
Congressional Record, Vol. 81, p. 7651 (1937)	117
Corpus Juris, Vol. 28, p. 620	61
Douglas and Hackman, "The Fair Labor Standards Act," 53 Pol. Sci. Q. 491	115
General Counsel's Opinion No. 1941, R. R. 35 and U. I. 11, Railroad Retirement Board, September 17, 1941	135
House Report No. 1452, 75th Congress, First Session	118
House Report No. 2182, 75th Congress, Third Session	118
House Report No. 2738, 75th Congress, Third Session	119
Internal Revenue Bulletin, C. B. 1938-1	133
Senate Report No. 884, 75th Congress, First Session	116
Wage and Hour Division, General Counsel's Interpretative Bulletin No. 3, issued October 21, 1938, and revised August and October, 1940, 2 C. C. H. Labor Law Service, Par. 32103, 52 Wage and Hour Reporter 500	102

IN THE
Supreme Court of the United States

OCTOBER TERM, 1941.

No. 112.

C. L. WILLIAMS, individually and as duly appointed
and authorized agent and representative for HERBERT
AIKEN, et al.,

Petitioner,

v.

JACKSONVILLE TERMINAL COMPANY, a corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT.

BRIEF FOR RESPONDENT, JACKSONVILLE
TERMINAL COMPANY.

OPINIONS BELOW.

The order of the District Court containing findings
of fact and conclusions of law (R. 195-203) is reported
in 35 F. Supp. 267. The opinion of the United States
Circuit Court of Appeals for the Fifth Circuit (R.
214-222) is reported in 118 F. (2d) 324.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit, here sought to be reviewed, was entered on the fourth day of March, 1941 (R. 223).

The petition for a writ of certiorari was filed May 31, 1941, the jurisdiction of this Court being invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938, U. S. C. Title 28, Section 347 (a). The petition for certiorari was granted on October 13, 1941.

QUESTIONS PRESENTED.

(1) Whether or not the respondent, Jacksonville Terminal Company, hereinafter referred to as the defendant, complied with the minimum wage provisions of Section 6 (a) of the Fair Labor Standards Act by paying the wages of its red cap employes, represented by the petitioner, hereinafter referred to as plaintiffs, in accordance with its so-called Accounting and Guarantee Plan. Under that plan the red caps were required to report to the respondent the sums received by them from respondent's patrons for their services in the capacity of such employes, and such sums were applied on the red caps' wages. If the sums so accounted for exceeded the minimum statutory wage prescribed by Section 6 (a) of the Act, the red caps were permitted to keep the entire amount;

while if said sums fell short of the statutory minimum, respondent made up the difference by direct payment to the red caps.

This question may be broken down into the following two subordinate questions:

(a) Was the defendant, as employer of the plaintiff red caps, legally entitled to apply on the wages due from defendant to plaintiffs the sums received by the plaintiffs from the traveling public for services performed as defendant's employees and in the course of such employment?

(b) Did this method of payment satisfy the requirements of Section 6 (a) of the Fair Labor Standards Act?

(2) ~~Whether~~ or not under Section 6 of the Railway Labor Act the defendant was entitled to put into effect said Accounting and Guarantee Plan with respect to its red cap employees.

STATUTES INVOLVED.

The statutory provisions involved are Sections 3 (m), 6 (a), 11 (c) and 16 (b) of the Fair Labor Standards Act of 1938, Act of June 25, 1938, c. 676, 52 Stat. 1060, at 1061, 1062, 1066 and 1069, U. S. C. Title 29, Sections 203 (m), 206 (a), 211 (c) and 216 (b); and Sections 2, seventh, and 6 of the Railway Labor Act, as amended by the Act of June 21, 1934, c. 691, 48 Stat. 1185, at 1188 and 1197, U. S. C. Title 45, Sections 152, seventh, and 156.

The provisions of the Fair Labor Standards Act, above referred to, are as follows:

"Sec. 3. As used in this Act * * *

"(m) 'Wage' paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities; if such board, lodging, or other facilities are customarily furnished by such employer to his employees.

"Sec. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates —

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour.

"Sec. 11 (c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder."

"Sec. 16 (b) Any employer who violates the provisions of section 6 or section 7 of this Act

shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

The provisions of the Railway Labor Act as amended, referred to above, are as follows:

"Sec. 2. Section 2 of the ~~Railway~~ Labor Act is amended to read as follows: * * *

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

"Sec. 6. Section 6 of the Railway Labor Act, is amended to read as follows:

Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements

affecting rates of pay, rules or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice.

In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

STATEMENT.

I. HISTORY OF THE CASE.

This is one of a series of cases brought against terminal companies and railroads throughout the country, all of which involve substantially the same issues of law. Other cases of the same series are *Harrison v. Kansas City Terminal Ry. Co.*, 36 F. Supp. 434, decided January 11, 1941 (United States District Court for the Western District of Missouri, Western Division); *Ryan v. The Denver Union*

7

Terminal Co., decided July 17, 1941, not yet reported (United States District Court for the District of Colorado); *Taylor v. Pennsylvania-Reading-Seashore Lines, Inc.*, decided April 19, 1941, not yet reported (United States District Court for the Eastern District of Pennsylvania); *Union Terminal Co. v. Pickett*, 118 F. (2d) 328, decided March 4, 1941 (Circuit Court of Appeals for the Fifth Circuit, reversing 33 F. Supp. 244, United States District Court for the Northern District of Texas). In all these cases the decisions below have been for the defendants, and the last cited case, *Union Terminal Co. v. Pickett*, is on appeal in this Court and to be argued immediately following the argument in the case at bar.

In the case at bar, action was brought on August 19, 1940, by C. L. Williams, individually and as duly appointed and authorized agent and representative of other named persons, denominated in the complaint and hereinafter referred to as plaintiffs, against the defendant, Jacksonville Terminal Company, in the District Court of the United States for the Southern District of Florida, Jacksonville Division (R. 1). The complaint alleged that the plaintiffs, who were described as "red cap" employees of the defendant, were entitled to the sum of \$59,923.08 as unpaid wages which the complaint alleged had accrued and had not been paid by the defendant (R. 4, 5). The sum so claimed represented the amounts reported by the red caps as collected by them from defendant's

patrons and which defendant had permitted them to keep and had applied on their wages. Plaintiffs contended that they should not merely have been permitted to keep such amounts, but should have been paid the full statutory minimum wage in addition. Further, plaintiffs claimed under Section 16 (b) of the Fair Labor Standards Act a like additional sum as liquidated damages, and an adequate attorney's fee (R. 5).

The defendant in its answer set forth that it had fully complied with the provisions of the Act by its so-called "Accounting and Guarantee Plan" (R. 7-12). Under this plan plaintiffs and all other red cap employees of the defendant were required to report to the defendant the amounts of money received by them from the Terminal Company's patrons for the services which they rendered to such patrons in the course of their employment by defendant (R. 9-11; 121-122). The red caps were permitted to keep all such money, whether it amounted to more or less than the statutory minimum wage for the hours which they worked, and, in the event that it amounted to less, the Terminal Company announced that it would pay to them (R. 121-122), and did in fact pay to them (R. 13-44; Stipulation, par. 4, R. 47-48), the additional amount needed to make up the deficit between the sums collected by each red cap from the defendant's patrons and the statutory minimum wage. If the red cap reported receipts in excess of the statutory minimum wage he was permitted to keep the entire amount (R. 65).

Plaintiffs and defendant each filed a motion for summary judgment (Pl. Motion, R. 48; Def. Motion, R. 44). Certain stipulations were entered into and certain depositions taken by the plaintiffs, in the course of which plaintiffs introduced various exhibits. On October 21, 1940, the trial court granted the defendant's motion for summary judgment, denied the plaintiffs' motion for summary judgment, and dismissed the complaint (R. 195-203).

Plaintiffs appealed to the Circuit Court of Appeals for the Fifth Circuit which, on March 4, 1941, affirmed the judgment of the trial court, Circuit Judge Holmes dissenting (R. 214-223).

II. STATEMENT OF FACTS WITH RESPECT TO THE APPLICATION OF SO-CALLED "TIPS" ON PLAINTIFFS' WAGES.

The circumstances which eventuated in the Accounting and Guarantee Plan are set forth in paragraphs 6 and 7 of Defendant's Answer herein (R. 8-10), and are disclosed by the report of the Interstate Commerce Commission in *Regulations Concerning Employees under Railway Labor Act, Ex Parte No. 72 (Sub-No. 1)*, 229 I. C. C. 410 (1938). In 1937 and for many years prior thereto, American railroads and terminal companies, including the defendant Terminal Company, treated so-called "red cap" porters at their passenger stations as concessionaires, entitled to offer their services to the railroads' patrons, under certain

rules and regulations designed to assure efficient and courteous service, to patrons who desired the service. The defendant Terminal Company, like many other railroads, paid no wages directly to the red caps, but permitted them to collect and retain all sums that were paid them for their services by the public.

On July 10, 1937, the International Brotherhood of Red Caps filed a petition with the Interstate Commerce Commission praying the Commission, under authority alleged to be vested in it by Section 1, fifth, of the Railway Labor Act (as amended by the Act of June 21, 1934, c. 691, 48 Stat. 1186, U. S. C. Title 45, Section 151, fifth), to make a finding that red cap porters were employees of the railroads on whose premises they served. On October 10, 1938, the Commission, by Division 3, granted the request and made a finding that red caps were employees at passenger stations and other places on carriers' premises in cities of over one hundred thousand population (229 I. C. C. 410, at page 420).*

On October 24, 1938, or about two weeks after the order of the Interstate Commerce Commission was announced, the minimum wage provisions of the Fair

* It appears from the report (page 415) that the carriers, in the proceedings before the Commission, contended that the Commission was without jurisdiction under Section 1, fifth, of the Railway Labor Act, to determine the status of persons, as employees or non-employees, a position which the Commission rejected in that case but which it has subsequently adopted in *Hudson & M. R. Co. Employees—Railway Labor Act, Ex Parte No. 72* (Sub-No. 1), decided May 6, 1941 (245 I. C. C. 415). However, when the Commission's report of October 10, 1938 was made, this Court had already rendered its decision in *Shannahan v. United States*, 303 U. S. 596, 58 S. Ct. 732 (1938), *Rochester Telephone Corporation v. United States*, 307 U. S. 125, 59 S. Ct. 754 (1939) had not yet been decided, judicial review did not seem available, and the carriers acquiesced.

Labor Standards Act were, by their terms, to become effective (Fair Labor Standards Act, Section 6(b)). The railroads, including the defendant Terminal Company, were, therefore, confronted with the problem of adjusting themselves to two new situations at once: first, the situation created by the necessity of treating as employes a class of workers whom they had not before regarded as such, and second, the necessity of complying with the provisions of the Fair Labor Standards Act with respect to such employes. The Accounting and Guarantee Plan was the result of an effort to meet these two problems.

In order to understand that plan it is necessary to look, first, at the situation created by the Commission's finding that red caps were not concessionaires, as the railroads had hitherto treated them, dealing with the public on their own account, but instead were employes of the railroads (Def. Ans. par. 6, R. 8-9).

So long as the red caps were treated by the railroads as concessionaires, there was no question of their right to retain as their own whatever sums they collected for performing such service as they were called upon to perform by those of the traveling public who retained and compensated them. Such compensation as they received was theirs because they performed the work on their own account. When, however, their status in performing this work was defined by the order of the Interstate Commerce Commission as that of employes, it at once followed that in performing the work they were acting not for their

own account but for the account of their employer (Def. Ans. par. 6, R. 9).

This is of course clear, because a worker cannot at one and the same time occupy two mutually inconsistent positions. If he is working for his own account as a concessionaire, or independent contractor, he cannot at the same time, and with respect to the same work, be an employee. On the other hand, if he performs the work as an employee, then he must be doing it for his employer. Accordingly, if the red caps were employees of the railroads in carrying hand baggage or performing other service for passengers, they must have been performing this service for the account of the railroads as their employer, and not for themselves as independent businessmen.

The order of the Interstate Commerce Commission which found the red caps to be railroad employees thus created a situation that necessarily affected the status of the sums which they received from the public for their services. As long as they were treated as concessionaries or independent contractors on their own account, the railroads, which permitted them to work upon their premises; had no concern whatever with the compensation which they received for such work. The moment, however, that they were held to be employees of the railroad, it necessarily followed that the work they did was done in the capacity of employees and, therefore, done by the railroad through them, in the same way that any employer serves the public through his employees. Where work is thus

done by an employer through employes, the employer is naturally entitled to whatever compensation is received for the service, whether paid by the public to the employes or directly to the employer. Correspondingly, the employes' own compensation must in turn come from the employer.

It follows, therefore, that when the red cap porters became employes of the railroad with respect to the performance of the service in which they were engaged, the railroads became entitled to the money which the public paid for the performance of that service. *A fortiori* if the red caps, as they contended before the Interstate Commerce Commission, had in fact always, or at least for many years, been employes of the railroads, then throughout that entire period the railroads had been entitled to the money collected by the red caps and, had they so desired, could have called upon the red caps to turn over that money to them, paying them directly a regular wage, instead. This the railroads had not done, and, if the red caps were employes all along, their right to retain their receipts from the public was derived from the permission of their railroad employers. In other words, the situation must be taken to have been one in which those employers, instead of directly paying the red caps a fixed amount of money as their wage, allowed them to treat as wages whatever they received from the traveling public. This result necessarily ensues from the status of the red caps as employes, from whatever date that status is regarded as having come into existence—whether from the date of the finding

of the Interstate Commerce Commission or from some earlier date as claimed by the red caps.

This situation resulting from the employer-employee relationship confronted the railroads when it became necessary for them to determine in what manner to meet their obligations to the red caps under the Fair Labor Standards Act. Of course, no proof or argument is needed to establish the obvious fact that the red caps would have liked the railroads to pay them directly an amount equal to the full wage prescribed by the Act and at the same time permit them, in addition, to retain for themselves, as before, the full compensation paid by the public for the performance of the service. They would, of course, not have objected to occupying the inconsistent position of employees for the purpose of receiving a wage from the railroads and of independent concessionaires for the purpose of themselves collecting and keeping all that the public paid for their services. The railroads might, indeed, have adopted this course, but had they done so the result would have been in practical effect, as well as in legal analysis, to have increased the red caps' wages by whatever additional amount was collected by them from the public for their services. Each red cap would thus have received two wages, and both in effect from his employer, viz.: the wage directly paid by the railroad from its treasury, and the additional wage paid in the form of permitting him to retain the money paid by the public for the service performed by the railroad through him as its employee.

The railroads, including the defendant Terminal Company, proceeded as if it were not necessary for them to adopt such a course in order to comply with the provisions of the Act. It is clear that other possible courses were available, among which was the so-called Accounting and Guarantee Plan which they did in fact adopt (Def. Ans. par. 8, R. 10-11; Pl. Ex. 18, R. 55, 121-122).

A conceivable course would have been for the railroads to do at once in October, 1938, what as a matter of common knowledge they have practically all done subsequently, namely, announce to the public a fixed charge for red cap service at the rate of so much per package handled, requiring the red caps in the course of their duties to act as collectors of this charge, in the same way that an attendant at a parcel room collects and turns in to the company the charge of so much per parcel handled (R. 64-65). The sudden and immediate introduction of a practice of this kind, so relatively novel in character, presented the danger of disturbing existing and well understood practices and relations between the railroads and the traveling public.

A second alternative, which would have involved no innovation so far as the public was concerned, would have been simply to instruct and require the red caps to turn in to the company at the close of each tour of duty the amounts received for the service which, through them as its employees, the company was now rendering to the public. If this plan had been

adopted, the amounts so received by the company would have gone to increase the funds out of which the company's obligation to pay wages to the red caps at periodic pay-days would have been defrayed. This alternative, therefore, would have been only a more roundabout method of accomplishing the same result which was, in fact, more simply and directly accomplished by the Accounting and Guarantee Plan (Def. Ans. par. 7, R. 9-10).

The basis and theory of the Accounting and Guarantee Plan, as is apparent on the face of the plan, was nothing more nor less than that the employing company, instead of requiring the red caps to turn over to it daily the compensation which they received from the public for the service they rendered as employees of the company, and subsequently paying them wages on fixed pay-days in whole or in part out of the sums turned in, would follow the simpler method of permitting them to retain such sums toward the payment of their wages and then pay them out of the company's treasury any deficiency between the amounts which they were so permitted to retain and the full amount of the minimum wage which the employer was required to pay them by the provisions of Section 6 (a) of the Fair Labor Standards Act. This was the method which the defendant, in common with practically all the other railroads of the country, adopted (Def. Ans. par. 8, R. 10-11; Pl. Ex. 18, R. 55, 121-122; R. 64), and which has given rise not merely to the present suit but to the others referred to above.

It is clear that in effect the method was no more than a continuation of that under which the red caps had previously been paid, assuming them, according to their own contentions, to have always been employees of the carriers rather than concessionaires. As has been pointed out above, if they were in fact employees prior to July 10, 1937, the date of their petition to the Interstate Commerce Commission, their right to retain the amounts which they collected from the public for their services was derived from the permission of the employer, and these amounts, therefore, constituted in effect wages paid by the employer. Of course, prior to the adoption of the Accounting and Guarantee Plan it was possible that those wages might not have amounted to the statutory minimum prescribed by the Fair Labor Standards Act. The Accounting and Guarantee Plan was introduced for the purpose of avoiding this possibility. The red caps, as before, were compensated by their employer by being permitted to retain the sums received for the service which they performed for the public as his employees. The only change introduced by the Accounting and Guarantee Plan was that under that plan the employer agreed to make up, and did in fact make up, any deficiency by which such sums fell short of the statutory minimum. The requirement to report was merely for the purpose of enabling the employer to make up the deficiency (R. 64-65).

The plan had the additional advantage for the red caps that, in the event that the amount which they

received from the public as compensation for the service that they performed, and which they reported to their employer, exceeded the minimum wage prescribed by law, they were permitted by the employer to retain the entire amount, including the excess (R. 65). Thus, under the plan, employees could not receive less than the minimum statutory wage, while they had the opportunity of earning more.

Further, the plan operated for the accommodation of the red caps by not requiring them to wait for periodic pay-days to receive their wages, but, instead permitted them to have available a sum of money at the close of each day as they had always been accustomed to in the past, thus not imposing on them any inconvenient change in their habits (R. 64-65).

The Accounting and Guarantee Plan was placed in effect by the defendant Terminal Company by serving upon each of the red caps a notice immediately prior to October 24, 1938, the date on which Section 6(a) of the Fair Labor Standards Act became effective. Said notice was in the following form (Def. Ans. par. 8, R. 10-11; Pl. Ex. 18, R. 35, 121-122):

"In view of the requirements of the Fair Labor Standards Act, effective October 24, 1938, and in consideration of your hereafter engaging in the handling of hand baggage and traveling effects of passengers or otherwise assisting them at or about stations or destinations, it will be necessary that you report daily to the undersigned the amounts received by you as tips or remuneration for such services.

"The carrier hereby guarantees to each person continuing such service after October 24, 1938, compensation which, together with and including the sums of money received as above provided, will not be less than the minimum wage provided by law.

"You are privileged to retain subject to their being credited on such guarantee all such tips or remuneration received by you except such portion thereof as may be required of you by the undersigned for taxes of any character imposed upon you by law and collectible by the undersigned.

"All the matters above referred to are subject to the right of the carrier to determine from time to time the number and identity of persons to be permitted to engage in said work and the hours to be devoted thereto, to establish rules and regulations relating to the manner, method and place of rendition of such service, and the accounting required."

On and after October 24, 1938, each of the said red caps, pursuant to this notice and throughout the period covered by this action, retained all money received by him from passengers of defendant Terminal Company and made daily reports to the defendant of the amount so received. In every case where the total of the amounts received by a red cap from the defendant's passengers was less than the minimum wage requirement of the Act, the defendant paid to each red cap reporting such a deficiency the difference between the amount so reported and

the minimum prescribed by Section 6 of the Act, with the result that each and every one of the plaintiffs for the whole period covered by this action received an amount of money equal to or in excess of the statutory minimum wage. This appears from the Bill of Particulars (R. 13-44), which the plaintiffs admit by stipulation (R. 47-48) to be true.

The Bill of Particulars discloses that during the period covered by the suit, viz., from October 24, 1938, when the Accounting and Guarantee Plan was introduced, to June 30, 1940, when it was superseded by the imposition of a direct service charge to the public, the red cap plaintiffs received from the defendant Terminal Company an amount equal to the total minimum statutory wage, viz., \$40,594.69, of which \$32,273.36 represented so-called tips reported by the red caps as having been received from the public, while \$8,321.33 represented amounts received directly from the defendant Terminal Company to make up the difference between the sums received by each red cap from the public and the amount of such red cap's statutory minimum wage (R. 13). The Bill of Particulars also shows, under Items 5 and 6, that the aggregate sum received by the red caps from the public amounted during the period to \$35,293.12, of which only \$32,273.36 was applied on their wages; the excess, amounting to \$2,919.76, represents the sums which particular red caps received from the public in excess of their statutory minimum wage and which under the Accounting and Guarantee Plan they were

permitted to keep (R. 13). In other words, not merely did every red cap receive the full amount of the statutory minimum wage, but the red caps as a group received more than \$3,000 in excess of the minimum wage prescribed by law.

The application of simple arithmetic to the figures summarized from the record in the preceding paragraph discloses that, taking the plaintiff employees of the Terminal Company as a group, four-fifths of their statutory minimum wages were derived from the sums paid by the public for the service. The statutory minimum wage during the period covered by this action was 25 cents per hour during the first twelve months and 30 cents per hour during the final nine months, or a weighted average of 27 cents per hour. Four-fifths of 27 cents per hour is 21.6 cents per hour. If the plaintiffs are correct in their contention that they were entitled to retain the amounts collected from the public and in addition be paid by the defendant the full statutory wage, the result would have been that during the first twelve months covered by this action they would have received earnings at the rate of 46.6 cents per hour, and during the last nine months of the period at the rate of 51.6 cents per hour. In short, the plaintiffs' contention is that under the Fair Labor Standards Act they were legally entitled to earn 46.5 cents per hour for the first twelve months and 51.6 cents per hour for the ensuing nine months.

III. STATEMENT OF FACTS WITH RESPECT TO THE EFFECT OF THE RAILWAY LABOR ACT.

Not merely do the plaintiffs contend that the defendant's payment of wages to them under the Accounting and Guarantee Plan thus failed to comply with the requirements of the Fair Labor Standards Act; but they also advance the additional contention that the defendant had no right to put the Accounting and Guarantee Plan into effect because of certain provisions of the Railway Labor Act (Petitioner's Brief, pp. 13, 21-25). Briefly stated, their argument rests on the proposition that the sections of the Railway Labor Act to which they refer, viz., Section 2, seventh, and Section 6, prohibit the employing carrier from changing by unilateral action the terms of an existing collective agreement (Petitioner's Brief, pp. 21-25). To derive support from this proposition they contend in their brief that, at the time when the defendant gave notice of the Accounting and Guarantee Plan to its red cap employees, there was in existence an agreement covering those employees which the defendant attempted to change unilaterally by instituting the Accounting and Guarantee Plan. This contention is most clearly stated in the first specification of error, which appears at page 18 of petitioner's brief in this Court. The specification is that the court below erred:

"in holding that the railroad may by its own fiat disregard its existing bargaining agreement

with red caps and pending negotiations with their accredited representative, by its own unilateral action effect a change in the rates of pay and working conditions in the face of a continued series of protests and refusals to consent."

The contention thus advanced makes it necessary to summarize in this statement a sequence of facts set forth in the various depositions and exhibits contained in the record. These depositions and exhibits relate to conferences, negotiations and correspondence which took place beginning October 25, 1938, between L. L. Wooten, General Chairman of the Brotherhood of Railway and Steamship Clerks, and J. L. Wilkes, President and General Manager of the defendant Terminal Company, looking towards the negotiation of a collective agreement to cover the latter's red cap employes. The facts disclosed by these depositions and exhibits relate to the question of when such an agreement was entered into and what provisions it contained. Their relevance, if any, is with reference to the claim of the plaintiffs, now presented in this Court for the first time, that on the date when the defendant introduced the Accounting and Guarantee Plan by its notice of October 24, 1938, its red cap employes, including the plaintiffs, were already covered by an existing agreement of February, 1937, between the Terminal and the Brotherhood of Railway Clerks. This contention, it is submitted, is completely disproved by the facts in the record, which will now be reviewed.

The notice of the Accounting and Guarantee Plan as set forth above was delivered to each of the defendant's red caps before October 24, 1938 (Def. Ans. par. 8, R. 10-11; Pl. Ex. 18; R. 55, 121-122). On the following day, October 25, 1938, Wooten, who was the General Chairman of the Railway Clerks' organization in Jacksonville, wrote a letter to Wilkes and other officers of the defendant Terminal Company (Pl. Ex. 1-A, R. 52, 93-94), in which he called attention to the decision of the Interstate Commerce Commission in *Ex Parte* No. 72 to the effect that red caps were employees under the terms of the Railway Labor Act and advanced the contention that since they were employed in and around stations they were automatically brought within the jurisdiction of the Clerks' organization and so came within the scope of the then existing agreement between the Clerks' organization and the Terminal. This agreement, effective February 1, 1937, is set forth as Defendant's Exhibit No. A (R. 81, 166-189).

There is a statement in petitioner's brief (page 23), to the effect that:

"The Terminal Company's * * * failure to challenge the coverage of the Red Caps by the agreement of February 17th, 1937, until after the institution of this suit leaves the inescapable conclusion that each of the parties considered that this agreement covered these Red Caps from the date of the ruling of the Interstate Commerce Commission."

This is a simple misstatement of fact. The record is replete with evidence that the Terminal Company from the very beginning challenged the contention that the red caps were covered by the Clerks' agreement of February 17, 1937. Thus on October 27, 1938, Wilkes replied to the foregoing letter from Wooten, in a letter which is set forth as Plaintiffs' Exhibit 19 (R. 55-56, 122-123). The pertinent paragraph of this letter of Wilkes is as follows:

"It is my opinion that Paragraph (a) under the subject of Exceptions in our agreement" [viz.: the above-mentioned agreement of February, 1937, between the Terminal and the Clerks] "exempts Red Cap service from the application of the rules of that agreement, as they are individuals performing personal service not a part of the duties of the company. Red Caps were not included or mentioned by name in the negotiations of our existing agreement, and in our recent conference subsequent to the decision of the I. C. C., *Ex Parte* 72, you stated to me that your organization did not represent the Red Caps. I think the wording of our agreement under Exception (a) is very clear, and must have had in mind such a type of employe as the Red Cap, who performs strictly personal service for the passengers which is not a part of the duty of the company. However, assuming that my views as above expressed should be held to be wrong, it still seems to me that in view of the fact that your organization has never represented Red Caps in the past, these Red Caps, now termed by the I. C. C. to be employes under the Railway Labor

Act, should have a voice as to whom represents them; and until such a time as the entire matter is cleared up, we do not feel that representation arbitrarily seized or taken by your organization should be recognized. Possibly, some clarification of this may come in the near future, and I shall be glad to talk it over with you on your next trip into Jacksonville.

Yours very truly,

(s) J. L. WILKES

President-General Manager.

This letter plainly shows that Wilkes refused to recognize that Wooten as Chairman of the Clerks represented the red cap employes of the Terminal, and, *a fortiori*, denied that these red caps had been brought automatically by the decision of the Interstate Commerce Commission under the existing agreement between the Clerks and the Terminal. At the same time he insisted that, since the Clerks' organization had never represented the red caps, the red caps should have a voice as to who should represent them, and that, without such an expression by the red caps, the right to represent them should not be arbitrarily seized by the Clerks.

In response to this demand by Wilkes that the red caps should have a voice as to their representative, Wooten thereupon proceeded to obtain authorizations from the red caps to act as their representative, as appears from his testimony as follows (R. 71):

"Direct Examination."

By MR. L'ENGLE:

Q. State your name and residence, Mr. Wooten.

A. L. L. Wooten, Wilmington, North Carolina.

Q. What is your present occupation, sir?

A. General Chairman, representing the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, on the Atlantic Coast Line Railroad; the Jacksonville Terminal Company, the Albany Passenger Terminal Company, the Savannah Union Station, and the Charleston Union Station.

Q. I understand this organization to be a union of employees of the railroads working under the Atlantic Coast Line Railroad Company?

A. It is an international organization, composed of employees in the clerical and station and storeroom classes.

Q. Does that organization have the authority, or were they appointed by the red caps, or the plaintiffs in this case, the red caps employed by the Jacksonville Terminal Company, to negotiate contracts and wage agreements for them with the Jacksonville Terminal Company?

A. It was.

Q. At or about what time?

A. About November 3rd, was when the official authorizations were turned over to me.

Q. What year?

A. 1938."

From this testimony it is plain that Wooten dates his right to represent the red caps from "about November 3rd", 1938, when his organization received

the authority from, or was appointed by, the red caps to negotiate for them with the Jacksonville Terminal Company. This negatives the statement in petitioner's brief (p. 23) that "the only authority Wooten had to treat with Wilkes for the Red Caps was the collective bargaining agreement of February, 1937," and disposes of the contention that the Clerks' organization represented the red cap employes of the Terminal Company at any time prior to November 3, 1938. Clearly, therefore, that organization did not represent the red caps at the time when it negotiated the Clerks' agreement of February, 1937, with the Terminal, and the red caps were not represented in the negotiation of that agreement, were not parties to it and had no rights under it.

Even without the foregoing recognition by Wooten of the need to obtain authorizations from the red caps before being entitled to represent them, there is no basis in the record for the contention made in his letter of October 25th to Wilkes, that the red caps when they were declared employes by the Interstate Commerce Commission came automatically under the Clerks' agreement of February 1, 1937, with the Terminal. That agreement under the heading "Exceptions" contains the following language (Def. Ex. A, R. 81, 167):

"These rules shall not apply to the following:

"(a) * * * to individuals performing personal service not a part of the duties of the Company."

This is the language referred to by Wilkes in the following sentence of his, above-quoted letter (Pl. Ex. 19, R. 55-56, 123):

"I think the wording of our agreement under Exception (a) is very clear, and must have had in mind such a type of employe as the Red Cap, who performs strictly personal service for the passengers which is not a part of the duty of the company."

That Wilkes was correct in his supposition that this language referred to red caps appears from the report of the Interstate Commerce Commission in *Ex Parte* No. 72 (229 I. C. C. 410, at page 415), where the Commission, referring to a ruling of the Director General of Railroads, uses the following language:

"The Director General of Railroads on March 14, 1919, issued a ruling interpreting his General Order 27 and Supplement 7 thereto as follows: 'The service performed by "Red Caps" is personal service not a part of the duty of the carrier'."

The use of this identical language of the Director-General in the agreement of 1937 between the Clerks' organization and the defendant Terminal Company is hard to reconcile with any other conclusion than that it was meant to be used in an identical sense, and since the Director General used the language with

reference to red caps, it is difficult to believe that it should not be construed as applying to them when used in the Clerks' agreement.

Quite apart from this, however, Wooten's contention, in his letter of October 25th (Pl. Ex. 19, R. 55-56, 122-123), that a new group of workers, on becoming, or being recognized as, employees, thereby fall automatically under the provisions of an existing agreement without any expression of their desire to do so or any opportunity to have a voice respecting the terms of the agreement, was apparently so novel and extreme that he himself abandoned it by obtaining the authorizations of November 3rd, referred to in his testimony quoted above (R. 71), and which must be taken to speak from that date. The representation of the plaintiff employees by the Brotherhood of Railway Clerks cannot therefore be held to antedate November 3, 1938.

Furthermore, having obtained these authorizations, Wooten seems at the time to have recognized that it was no longer possible to claim that the red caps came under the contract of 1937 which the Clerks' organization had negotiated more than a year before they had any authority to represent the red caps, and that a new contract covering the red caps was accordingly necessary. This appears from his letter to Wilkes of November 14, 1938 (Pl. Ex. 1, R. 51, 95), which reads as follows:

“WILMINGTON, N. C., Nov. 14th, 1938.

“Mr. J. L. Wilkes,
Pres. General Manager,
Jacksonville Terminal Co.,
Jacksonville, Fla.

“DEAR SIR:

“Referring to our conference on the 4th. relative to contract for Red Caps.

“We would like to get this closed up as soon as possible and I was wondering if you could meet me about the 21st. or very soon thereafter and draw and sign a contract covering them as you did not seem to be willing to agree that our present contract should cover them.

“Will you please advise me when you can go into this again with a view of drawing the rules along the general lines outlined to you on Nov. 4th.

Yours very truly,

(s) L. L. WOOTEN,

General Chairman.

This letter is a clear indication of an abandonment of the claim that the red caps were covered by the contract of 1937, and is an invitation to Wilkes to negotiate a new and separate contract covering them.

But Wooten was not content with the mere prospect of negotiations for a new contract. His next position was the novel and inconsistent one of claiming that the 1937 contract was applicable at least until a new one could be arranged—in other words, that a contract which did not exist as between the parties in

question should be treated as though it did exist with respect to them until a contract which actually covered them could be agreed upon. This position is revealed in Wooten's letters of November 16th (Pl. Ex. 2, R. 52, 96) and November 26, 1938 (Pl. Ex. 3, R. 52, 97), in the first of which he states that he had advised Wilkes on October 25th that he considered the red caps as coming within the scope of the existing Clerks' agreement until such time as a separate agreement might be made therefor, and in the second of which he states, "We have advised you that we will expect the terms of our existing agreement to apply to red caps until such time as changes might be made."

However, it is entirely clear from Wooten's letter of December 7, 1938 (Pl. Ex. 5, R. 52, 100-101), that Wilkes did not agree that the existing Clerks' contract should be treated as applicable to red caps, since the letter complains that the Terminal Company was not applying the rule of seniority in laying off men as required by that contract, and Wooten threatens to take the matter to the "Board" (by which is apparently meant the National Railroad Adjustment Board at Chicago): He continues: "If we are to hold the contract matters in abeyance, such injustices must be rectified, for while we want to be reasonable we feel that the present agreement applies until such time as you may be willing to consider and agree on the proposals made to you some days ago."

There is nothing whatever in the record to indicate that at any time Wilkes or any one else authorized to represent or speak for the Terminal Company accepted or acquiesced in the view that the red cap employes of the Terminal were covered by the Clerks' agreement of 1937. That the Terminal's ultimate recognition of the right of Wooten and the Clerks' organization to represent the red caps was based solely upon the specific authorizations which they had obtained from the red caps on or about November 3, 1938, is shown by Wooten's letter to Wilkes dated February 20, 1939 (Pl. Ex. 8, R. 53, 103-104), in which the following sentence occurs:

"You have, *after proof was submitted*, recognized our organizations as being the *duly authorized organization* to represent these men."
(Emphasis supplied.)

In short, the recognition by the Terminal Company of Wooten and the Clerk's organization as the authorized bargaining representatives of the red cap employes does not sustain the inference that the Terminal thereby recognized and accepted the organization's contention that the red cap employes came under the provisions of the existing agreement of 1937, which was negotiated with respect to other classes of employes and which explicitly excepted red caps. On the contrary, the Terminal's recognition of the Clerks' organization as the bargaining representative of the plaintiffs was based only upon the specific authorizations which that organization had

obtained on or about November 3, 1938, and the effectiveness of which dated from that time.

The inconsistency of Wooten's position is made clear by a sentence from Wilkes' letter of October 27, 1938, to Wooten (Pl. Ex. 19, R. 55-56, 122-123), already quoted above, which reads as follows:

"In our recent conference subsequent to the decision of the I. C. C., *Ex Parte* 72, you stated to me that your organization did not represent the Red Caps."

This sentence is to be read in connection with the following statement by Wooten in his deposition on cross-examination by Mr. Hartridge (R. 80):

"The date of *Ex Parte* 72, sub one was September 29, 1938. That *Ex Parte* was given to me, delivered to me, on October 24, 1938. The Red Caps employed by the Jacksonville Terminal Company had been negotiating with me for approximately two years to become organized and get an agreement or come within the scope of our agreement. The question of whether or not Red Caps were employees under the amended Railway Labor Act was before the Interstate Commerce Commission; and I notified these employees that it would be useless to become organized until the Commission had rendered their decision, but that as soon as that decision was rendered, if it was favorable, we would accept the employees into the organization and make contracts and handle their wages and working conditions as provided by the amended Railway Labor Act."

This statement by Wooten indicates definitely that up to October 24, 1938, it was his position, and was so stated by him to the red caps at the Jacksonville Terminal, that after the decision of the Interstate Commerce Commission in *Ex Parte* 72, and not until then, would the Clerks accept the red caps into their organization, and that thereafter they would proceed to make contracts and handle their wages and working conditions. This position is entirely inconsistent with the contention that the red caps were already covered by the Clerks' agreement, which was made more than eighteen months prior to that time. To hold that the Clerks, by receiving the red caps into their organization after they were declared employees, could automatically bring these new employees within the prior existing agreement made by the Clerks with the Terminal with reference to other and different classes of employees, would be to claim for the Clerks a right to alter that agreement unilaterally; contracts are not to be so altered.

A full and complete agreement covering red caps was finally negotiated and entered into between Wilkes, representing the Terminal, and Wooten, representing the employees, to become effective on June 16, 1939. This agreement is set forth in the record as Plaintiffs' Exhibit 12, R. 54, 107-116. Plaintiffs' counsel, in his brief in this Court, repeatedly attempts to represent this agreement as a mere amendment of the Clerks' agreement of February, 1937. Thus, he says (Petitioner's Brief, page 7):

"During the month of June, 1939, a similar agreement was actually entered into by Wilkes on behalf of the Terminal Company and Wooten on behalf of the Red Caps, (R. 107), *which was the first amendment to the collective bargaining agreement of February, 1937.*" (Emphasis supplied.)

There is nothing whatever in the circumstances leading up to the making of this agreement to support the contention that it was an amendment of the Clerks' agreement of 1937, and in fact the agreement of June, 1939, on its face expressly negatives such a contention. It is a complete and self-sufficient agreement, covering by its own provisions with respect to the red caps many of the subjects which the earlier Clerks' agreement undertook to cover with respect to the classes of employes that were subject to that agreement. Furthermore, Rule 1 of the red cap agreement of June, 1939, expressly negatives the claim that the red caps were subject to the prior and still subsisting Clerks' agreement of 1937, for this initial rule of the red cap agreement, to which the red caps are admittedly subject, expressly states that:

"These rules shall govern the hours of service and working conditions of all Red Caps, Red Cap Captains, and all other employes handling hand baggage *not already covered by agreement.*" (Pl. Ex. 12, R. 54, 107-108.) (Emphasis supplied.)

It is clear from the record that this agreement of June, 1939, was the first agreement of any kind

entered into between the defendant Terminal Company and any collective bargaining representative of the red caps. It was the first collectively bargained agreement between the plaintiffs and their employer, the defendant Terminal Company, and it was made more than seven months after the Terminal Company had put into effect the Accounting and Guarantee Plan by its notice of October 24, 1938.

This agreement, as concluded and executed, contains no provision whatever with respect to wages or methods of wage payment. During the entire period of the negotiations which led up to it, the red caps were working and being paid under the Accounting and Guarantee Plan. Wooten in a letter of November 30, 1938, to Wilkes (Pl. Ex. 4, R. 52, 98-99) proposed that, when an agreement should be entered into, it should contain the following provision with respect to wages:

"Twenty-five cents per hour to be paid as a minimum on any day for four hours service, which can be spread in a period of not more than nine hours, or date [eight?] within a twenty-four hour period, and red caps to be allowed such tips as they might secure during the entire time in and around station."

The record indicates that this and the other proposals contained in the same letter of Wooten were the subject of continuous conference with the Terminal Company during the ensuing months.

This proposal of Wooten's with respect to wages

was intended to take the place of the Accounting and Guarantee Plan then and subsequently in effect, and amounted to a demand that the red caps be allowed to retain all the compensation or tips which they received for their services from the public and, at the same time, be paid twenty-five cents an hour in addition by the employer, which was the minimum hourly rate prescribed by the Fair Labor Standards Act. Wilkes, representing the Terminal Company, declined to accede and, as pointed out above, when an agreement was finally reached in June, 1939, no provision was included respecting wages, and the Accounting and Guarantee Plan continued in effect. Wooten testified in his deposition that the question of wages was subsequently discussed at various times between himself and Wilkes down to July 1, 1940 (R. 77).

Wooten further testified (R. 74) that, at the time when the agreement of June, 1939, was concluded without any provision respecting wages, he discussed with Wilkes the bearing of the Fair Labor Standards Act on the Accounting and Guarantee Plan, and told him that:

"We would * * * wait on the decision or order of the Federal Wage and Hour Administrator as to the question of wages, as there had been set a hearing in Washington on this entire question of whether or not tips could be accounted as any part of wages."

He further stated that the hearing to which he referred was that conducted before the Wage and Hour

Division of the Department of Labor at the instance of the Brotherhood of Red Caps and the Brotherhood of Railway and Steamship Clerks, which resulted in the publication of "Findings and Recommendations" by the "presiding officer," Gustav Peck. These "Findings and Recommendations" appear in the record as Plaintiffs' Exhibit 33 (R. 75, 148-164). The pertinent recommendation appears at R. 164, to the effect:

"That the Division" [viz., the Wage and Hour Division of the Department of Labor] "take immediate steps through Court action to determine the validity of the accounting and guarantee arrangement under which many Red Caps are employed."

Wooten testified (R. 77):

"Mr. Wilkes, in all of the conversations * * * eventually stated that whatever was done by the Courts, that his company would have to do."

Finally, there occurs this series of questions and answers between Wooten and his counsel (R. 78):

"Q. Is that the reason that the question of wages was left out of the June 16, 1939 agreement, so that it could be put in the agreement in the event of a decision on the matter by the Administrator or by some judicial determination?

A. Yes, sir.

Q. There was not an agreement between you, representing these men, and him that the Guarantee and Accounting System should stand as the

manner and amount of wages to be paid these employees?

A. No, sir.

Q. Or that the system in existence at the time, that is, subsequent to June 16, 1939 agreement up to July 1, 1940?

A. No, sir. We protested that system and contended that at all times, in letters and personal conferences, that tips had no place as being any part of the wage that the law specified the employer should pay to the employee. And in many of these instances, I cited Mr. Wilkes to the rulings under the N. R. A. with regard to Dining car help, Pullman Porters, Hotel help, and many others, that tips were no part of wages.

Q. Then, I may say that your understanding with Mr. Wilkes was that the matter of wages, was to be left out of the contract until a determination, either by the Administrator or some judicial proceedings?

A. That is correct; and that we would then negotiate or apply whatever that decision might be, because I felt, and I think he did, that that was beyond our control whenever the Court or the Administrator might decide that issue."

It is submitted that all that the foregoing testimony and all the other testimony and exhibits in the record disclose, with reference to conversations and negotiations on the subject of wages, is that during the period covered by this suit there was never with respect to wages any collectively bargained agreement between representatives of the Terminal and representatives of the plaintiffs; that Wooten, as collective

bargaining representative of the plaintiffs, never agreed to accept the Accounting and Guarantee Plan; that he contended that the red caps were entitled to receive the full amount of the compensation or tips paid by the public in addition to the full statutory minimum wage, and that he and Wilkes were in agreement that the question would ultimately have to be determined by the courts, and that the Terminal would do whatever the courts ultimately should decide. In short, each party insisted on its own view of its legal rights, and in consequence the agreement of June, 1939, left the question of wages open.

Petitioner's brief advances the peculiar and entirely unsupported contention of fact that the Terminal Company abandoned and waived the effectiveness of its notice of October 24, 1938, which placed the Accounting and Guarantee Plan in operation. This assertion is made in the eighth Specification of Error at page 19 of the brief, and again on page 27. The two passages follow:

"The Court below erred:

"8. By holding that the Railroad could assert that its notice imposed a condition of employment, despite the Railroad's clear abandonment and waiver thereof; and despite the Railroad's execution of a collective bargaining agreement silent on wages and rates of pay for the admitted purpose of awaiting an authoritative determination of the Red Caps' right to and ownership of tips." (Specifications of Error, No. 8, Petitioner's Brief, p. 19.)

"October 25th, 1938, Wooten advised the Terminal Company that the bargaining agreement of February, 1937, covered the men and requested a conference. Negotiations and conferences continued and it was recognized by both sides that there was an existing dispute as to wages and hours. By these negotiations the Terminal Company clearly abandoned and waived any effect sought to be given the notice and never claimed or pretended to claim ownership of the tips.", (Petitioner's Brief, p. 27.)

Certainly, there is nothing whatever in the record to support the assertion that the Terminal did not at all times insist upon and maintain the Accounting and Guarantee Plan during the entire period covered by this action. On the contrary, the record shows affirmatively that the defendant kept the plan in effect and paid the plaintiffs thereunder, as appears from the defendant's Bill of Particulars (R. 13-44), which the plaintiffs by stipulation admit to be correct (R. 47). Throughout the negotiations, as shown by the depositions and exhibits, Wilkes refused to accede to Wooten's demand that the plan be abandoned and the red caps permitted to retain their tips, as well as receive the full statutory wage from the company. Certainly, this demonstrates clearly that the defendant did not waive the Accounting and Guarantee Plan or abandon the effect of the notice putting that plan into effect. Counsel for the plaintiffs is apparently contending that the defendant destroyed the effect of its notice by entering into negotiations with

Wooten and by the frank admission of Wilkes that the Terminal would ultimately have to do whatever the courts should decide. It would indeed be novel and unwarranted to infer a waiver from such evidence.

It is worth while, in passing, to call attention to another misstatement, which is twice repeated in the petitioner's brief, viz., that the Terminal "neglected or refused to pay any amounts guaranteed by the notice until the latter part of July or the middle of August, 1939" (Petitioner's Brief, page 27), and that "under the accounting and guarantee plan the Terminal Company neglected or failed, or refused to pay or make good the guarantee until required by a representative of the Wage and Hour Department who had checked its records to ascertain whether or not the Red Caps had received the money which the payrolls of the Terminal Company indicated had been paid them. The first money received by the Red Caps from defendant was subsequent to August 15th, 1939". (Petitioner's Brief, page 10).

Both these statements are entirely unsupported by the portion of the record to which they are referred (R. 66-67), or by any other part of the record. In the passage referred to, Wilkes testifies respecting a so-called "settlement" which, he says, "began back in July," obviously referring to July, 1939. He describes this settlement as a voluntary change on the part of the Terminal in the method of computing the number of hours worked by the red caps. According to his explanation, the method originally followed in computing the number of hours worked

was, "to total up the time which the red cap said he had worked * * *. Later on we felt that that method of keeping the time probably was not equitable and that we should take into consideration the time that the men were hanging around the station, between jobs waiting for work, as the proper medium for the rate per hour * * *. Then we had a settlement with the men through this Frank Leggett as to what the assigned hours with which the base of pay from the hours actually worked to the assigned hours; the assigned hours were longer than the actual working hours" (R. 67).

In short, Wilkes in referring to the "settlement" is describing a change voluntarily made by the Terminal in the method of computing time to be paid for, which resulted in the accrual of a considerable amount of back pay for the red cap employes of the Terminal. The men were given the back pay thus accruing to them and thereupon, at the request of a representative of the Wage and Hour Department, signed the receipts of August 17, 1939, concerning which Wilkes was asked by plaintiffs' counsel. He replied:

"The receipt which is mentioned in this question is a receipt which was originated by representatives of the Wages and Hour Department at Washington, who after checking our records sometime subsequent to August 15, 1939, decided to get a receipt from each individual red cap, to ascertain whether or not he had received the money which our payrolls indicated we had paid him in back pay" (R. 66).

Clearly there is nothing whatever in all this to show, as stated in petitioner's brief, that prior to August 15, 1939, the Terminal had not been paying the red caps the amounts needed to make up the Terminal's guarantee of the difference between the sums received by the red caps from the public and their statutory minimum wage. The testimony relates to an entirely different subject, viz., the payment to the red caps of certain back pay found to be due to them as a result of a change in the method of computing their working hours.

The necessity of presenting a clear and orderly statement of the pertinent facts has made it imperative to disentangle the confusion which runs throughout the Statement of Facts in petitioner's brief. Further assistance to the Court may be provided by summarizing the results of the foregoing review of the record, as follows:

1. The notice placing the Accounting and Guarantee Plan in effect was delivered to the red cap employees of defendant before October 24, 1938.
2. An agreement had been made between the defendant and the Brotherhood of Railway Clerks in February, 1937, which expressly excepted "individuals performing personal service not a part of the duties of the company." The Director-General of Railroads had held that the service performed by red caps is personal service not a part of the duty of the carrier. At the time said agreement was made between the Terminal and the Clerks, the Clerks did

not represent, and did not claim to represent, red caps.

3. On October 25, 1938, Wooten, General Chairman of the Clerks, wrote to Wilkes, President of the Terminal, claiming that red caps were covered by the Clerks' agreement of February, 1937.

4. On October 27th, Wilkes replied to Wooten, denying the claim and stating that he would not recognize any representation of the red caps unless the red caps had a voice as to who should represent them.

5. On November 3, 1938, Wooten's organization received the authority of the red caps employed by the Terminal to represent them. On the basis of this authority, Wilkes commenced to negotiate with Wooten. On November 14th, Wooten wrote Wilkes proposing to draw and sign a contract covering red caps, since Wilkes was not willing to agree that the Clerks' existing contract should cover them.

6. On November 16th and November 26th, Wooten advanced to Wilkes the claim that red caps were covered by the existing Clerks' agreement until a separate agreement covering them should be made. On December 7th, Wooten complained to Wilkes because the latter was not applying the seniority provisions of the Clerks' agreement to red caps.

7. On June 16, 1939, an agreement covering red caps was concluded between Wilkes, representing the Terminal, and Wooten, representing the red caps. This agreement did not purport to be, and was in

fact shown by its contents not to have been, in any sense an amendment of the Clerks' agreement of February, 1937. Furthermore, the red caps to whom it applied were stated to be those "who are not already covered by agreement."

8. The agreement of June 16, 1939, just referred to, contained no provisions respecting wages, because Wilkes steadily refused to accede to Wooten's demand, made in his letter of November 30, 1938, that the red caps should be paid directly by the defendant an amount equal to the full minimum wage as well as permitted to retain for themselves the sums paid by the public for their services.

9. Between June 16, 1939, and July 1, 1940, Wooten and Wilkes continued to confer from time to time respecting wages, neither being willing to give in to the other's claim, and both agreeing that whether or not the red caps were legally entitled to the full minimum wage, in addition to the amount received from the public, was a question which must ultimately be decided by the courts.

It is submitted on the basis of the foregoing facts that:

1. Plaintiffs are in error in contending that on October 24, 1938, the date of the notice which put the Accounting and Guarantee Plan into effect, there was in existence between the Terminal and its red cap employes a collective agreement which the notice attempted to alter by unilateral action.

2. Plaintiffs are in error in contending that the Clerks' agreement entered into between the Terminal and the Brotherhood of Railway Clerks in February, 1937, covered red cap employees.

3. Plaintiffs are in error in contending that the Terminal's recognition of the Brotherhood of Railway Clerks as the bargaining representative of the red caps involved a recognition or admission by the Terminal that the red caps were covered by the Clerks' agreement of February, 1937, since the Terminal's recognition of the Clerks' organization as the bargaining representative of the red caps was based upon the specific authorizations obtained by that organization from the red caps on or about November 3, 1938, and operating only from that date.

4. Plaintiffs are in error in contending that the agreement entered into in June, 1939, between the Terminal and its red cap employees was an amendment to the Clerks' agreement of February, 1937.

5. Plaintiffs are in error in contending that the Terminal waived or abandoned the Accounting and Guarantee Plan by conferring with Wooten on the subject of wages, or by admitting that the legality of the Accounting and Guarantee Plan would ultimately have to be passed upon by the courts.

6. Plaintiffs are in error in asserting that the Terminal neglected or refused to make good its guarantee under the Accounting and Guarantee Plan until the

latter part of July or the middle of August, 1939, and in asserting that the first money received by the red caps from the Terminal was subsequent to August 15, 1939.

INTRODUCTION TO ARGUMENT.

Plaintiffs in this Court are relying upon two main contentions, which are hereinafter set forth. The first of these was plainly and fully presented to both the courts below and rejected expressly in the opinions of both. The second was urged below with such indistinctness and indefiniteness, and with such fluctuations of meaning and argument, that neither of the courts below passed on it, and it is now presented to this Court in a wholly new and different form.

The plaintiffs' first main contention is that, because the defendant, prior to the notice of the Accounting and Guarantee Plan on October 24, 1938, had permitted the red caps who worked in and about its station to retain as their own the compensation which they received from the public for their services, the status of such compensation was thereby permanently fixed and established as that of gifts or donations from the public to the red caps, which thus became the absolute personal property of the latter; that this status could not be altered by act of the defendant by notice or otherwise; and that, therefore, after the notice of October 24th, as before, the sums received from the public by the red caps continued to be their absolute personal property and so could not be applied by the

employer on the wages which by Section 6 (a) of the Fair Labor Standards Act the employer was required to pay. This contention was fully considered by both courts below, discussed in their opinions, and definitely and expressly rejected by both.

The second main contention which is presented by the plaintiffs in their brief in this Court is that the defendant's notice of October 24, 1938, instituting the Accounting and Guarantee Plan, was ineffective and inoperative because it was in violation of Section 2, seventh, and Section 6 of the Railway Labor Act. Section 2, seventh, provides:

"No carrier * * * shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."

Section 6 requires the intended changes, after due notice, to be negotiated in conference between the employer and representatives of the employees. Plaintiffs now urge that the introduction of the Accounting and Guarantee Plan was a change introduced, or attempted to be introduced, by the defendant without such negotiation, in violation of these statutory provisions.

In the District Court plaintiffs made no reference whatever to the Railway Labor Act and made no argument based upon its provisions. Instead they merely urged that the defendant could not by its notice require the red caps to report and account for their so-called tips, against the "protest" of the red caps

and their "refusal to accede" to the plan. That this was the substance of the plaintiffs' contention is shown in the record by the grounds urged in the plaintiffs' motion for a new trial (R. 204-206), which contain no reference to the Railway Labor Act, just as there is no reference to that Act in the complaint (R. 1-5), the "transcript of proceedings" (R. 189-194), or in the court's opinion, findings of fact, or conclusions of law (R. 195-203).

The plaintiffs' contention in the District Court with respect to this part of the case was most clearly expressed in numbered paragraphs 10 and 14 of their motion for a new trial, which read as follows:

"10. The court overlooked the protest of the men at all times and the refusal of the men to accede to the appropriation of their tips."

"14. That the court overlooked the fact that it was stipulated by counsel for respective parties, that these Red Caps were employees of the Terminal Company under the terms of the Fair Labor Standards Act and the contention of the Red Caps prior to the effective date of the Act was that the tips belonged to them and not the Terminal Company, and requested the company to pay them the minimum wages" (R. 205).

This argument rests upon a presupposition of fact not supported by the record, insofar as it implies that the red caps individually at any time protested or refused to accede to the Accounting and Guarantee Plan, or that individually or through a collective representative they requested the company, before

the effective date of the Act or before the notice of October 24th, to pay them the full statutory minimum wage in addition to their so-called tips. That the red caps did not individually refuse to accede to the plan is shown by the fact that after the notice of October 24th they commenced, and at all times thereafter during the period covered by this action continued, to work under and in accordance with the plan, reporting their tips and accepting the additional sums paid to them by the defendant to make good its guarantee under the plan. That they did not collectively protest or contend that the tips belonged to them personally, either prior to the effective date of the Fair Labor Standards Act or prior to or at the time of the notice, is shown by the fact that they did not before November 3, 1938, have any authorized collective bargaining representative (see Statement above, page 22).

What the plaintiffs' argument in the District Court was apparently intended to mean was that, if the red caps were employees of the defendant at the effective date of the Fair Labor Standards Act, the defendant could not lawfully require them to account for their tips without first obtaining their consent expressed by and through a collective bargaining representative. Plaintiffs in the District Court did not contend that, either at the effective date of the Act or at the date of the notice which introduced the Accounting and Guarantee Plan, they were represented by an authorized collective bargaining representative or had any collective bargaining agreement with the defend-

ant. The form of their argument assumes that, although they were not so represented on those dates, nevertheless the defendant was legally incapacitated to place the Accounting and Guarantee Plan in effect until such representative should subsequently be appointed and give its consent to the plan. This appears to be substantially the same argument as that which prevailed with Judge Atwell in *Pickett et al. v. Union Terminal Co. of Dallas*, in the District Court for the Northern District of Texas, (33 F. Supp. 244, 1940), which is now here on appeal in conjunction with the instant case.

The Railway Labor Act made its first appearance in the plaintiffs' case in their brief in the Circuit Court of Appeals, but so indistinctly that that Court in its opinion did not even refer to it. Plaintiffs' contention as then presented was that, since the red caps had for many years been working for the Terminal and had been permitted during the entire period to retain their tips, this constituted an alleged "verbal" working agreement. Plaintiffs on this assumption thereupon proceeded to argue:

"Verbal though it may have been, it certainly was the agreement under which they were working, and just as effective as if it had been in writing signed by all the parties involved. The rights of the plaintiffs under their working agreement could not be taken away from them in any such high-handed manner as attempted by the publishing of the notice (*i. e.*, the notice of October 24, 1938, introducing the Accounting and

Guarantee Plan)" (Plaintiffs' Brief in Circuit Court of Appeals, page 21).

Plaintiffs then adduced Section 6 of the Railway Labor Act, and urged that that section invalidated the notice of October 24th as an attempt to alter the so-called verbal working agreement without negotiation, although the provisions of the Railway Labor Act relied on clearly refer, not to verbal or implied working agreements, but only to collectively bargained agreements concluded under the Act between an employer and the duly authorized collective representative of the employees, as will be argued more fully hereafter in the final section of this brief.

Apparently recognizing this fatal defect in their argument as presented in the Circuit Court of Appeals, plaintiffs now in this Court for the first time undertake to claim that there was actually in existence a collectively bargained agreement between the red caps and the defendant at the time of the notice of October 24, 1938. Accordingly, in their brief in this Court they advance the contention, not made in either of the courts below, that on October 24, 1938, and prior thereto, they were covered by and included in the Clerks' agreement of February, 1937, which had been negotiated between the defendant and the Brotherhood of Railway Clerks with reference to other classes of employees. That this claim is not merely unsupported but is definitely disproved by the record has been fully pointed out above in the Statement (pages 22-35). As there is no conflict in the testimony, and the sole question is with respect to the conclusion to be drawn

therefrom, defendant urges that there is no basis whatever for the contention that the plaintiffs had a collectively bargained agreement with the defendant on October 24, 1938, or were then represented by a duly authorized bargaining representative, and that, therefore, the provisions of the Railway Labor Act on which plaintiffs rely have no application to this case because of the complete absence from the record of any facts tending to support such a claim.

In the remainder of this brief, defendant's arguments in reply to the two main contentions of the plaintiffs as above summarized,—viz., (1) the red caps' alleged ownership of the tips, and (2) the argument based upon the Railway Labor Act, will be presented in the order indicated. Plaintiffs, in their brief in this Court reverse this order and argue, first, the contention based upon the Railway Labor Act (Petitioner's Brief, pages 21-29) and, second, the contention as to the red caps' alleged absolute ownership of the tips (*ibid.*, pages 29-36). However, the original order seems preferable, both because the argument with respect to the ownership of the tips involves the main issues presented by the case and also because the points developed in connection with that argument are necessary to a proper understanding of the argument based upon the Railway Labor Act.

There will first be presented a "summary of argument," followed by the argument itself, which will develop and support each of the propositions set forth in the summary.

SUMMARY OF ARGUMENT.

I.

The defendant, as employer of the plaintiff red caps, was legally entitled to apply on the wages due from defendant to the plaintiffs the sums received by the plaintiffs from the traveling public for services performed as defendant's employees in the course of such employment; and this method of payment complied with the requirements of Section 6(a) of the Fair Labor Standards Act because:

A. Where compensation is received by an employee from the public for services performed as such employee in the course of the employment, the employer and not the employee is entitled to such compensation and may direct and control its disposition.

B. Even if the sums received by red caps from the traveling public for services rendered in the course of their employment should be treated not as compensation from the public for such services, but as "tips" or "gratuities,"—which they were not,—nevertheless where tips or gratuities are received by an employee in the course of, and incidental to, his employment, the employer has the legal right to control and direct the disposition of such gratuities and may require them to be paid over or accounted for to him.

C. Since the defendant as plaintiffs' employer was lawfully entitled to control and direct the disposition of the sums received by the plaintiffs from the traveling public either as compensation for services rendered in the course of the

employment or as "tips" or "gratuities," defendant was entitled, in the absence of a collective agreement with the plaintiffs to the contrary, to exercise such control and alter the disposition of such sums without obtaining any other consent from the plaintiffs than was implicit in their continuing to work during pay periods after the altered disposition of such sums had been notified to them, and in their acceptance of the benefits conferred by such notice.

D. The defendant, by permitting the plaintiffs as its employees to retain as their own, sums over which the employer had a legal right of disposition and control, and by making up to the plaintiffs any deficit between such sums and the minimum statutory wage, has "paid" them in accordance with the requirements of Section 6 (a) of the Fair Labor Standards Act, and such payment fully complies with the requirements of that section as reasonably and properly interpreted in the light of the policy and intent of the Congress.

1. The words in which the statutory obligation to pay wages is expressed, when given their normal and ordinary legal meaning, do not require the manual delivery of money directly by the employer to the employee in amounts equal to the statutory wage rates, since on principles of common law a debt, and hence a wage, may be "paid" not merely by the delivery of money, but also by the transfer to the creditor of certain kinds of claims against third persons, viz., checks, if these result in the receipt of money from such third persons, and *a fortiori* by surrendering or for-

giving to the creditor an obligation to account for money which the creditor owes to the debtor.

2. It was the intent and policy of the Congress, in enacting the minimum wage provisions of the Fair Labor Standards Act, to require the employer to provide the employee with means sufficient to defray the cost of a minimum standard of decent living; and the minimum wage provisions of the Act should be construed according to that intent, in preference to a construction which would disregard the intent of the Congress and would require the employer to pay the employee at a substantially higher rate than that fixed by the Act.

(a) The history of minimum wage legislation shows that the purpose of such legislation has always been to insure to the employee the means sufficient to provide a minimum standard of decent living.

(b) The legislative history of the Fair Labor Standards Act, and the face of the Act itself, show that its only purpose was to insure to workers the means sufficient to meet the cost of a minimum standard of decent living, and not to impose additional burdens on the employer.

(c) Construction of the minimum wage provisions of the Fair Labor Standards Act in accordance with its purpose makes it clear that payment to the plaintiffs under the Accounting and Guarantee Plan was in compliance with the Act; and such a construction is to be preferred to the plaintiffs' construction, which would disregard the pur-

pose of the Act and would result in the payment of more than the minimum wage required by the Act.

3. The fact that defendant's construction of the Fair Labor Standards Act is in accord with the purpose of that Act is confirmed by the construction given to other social legislation, whereby tips have been regarded as equivalent to wages paid to the employee by the employer.

II.

The provisions of Section 2, seventh, and Section 6 of the Railway Labor Act, as amended, do not support the conclusion that the defendant, in paying wages to the plaintiffs under the Accounting and Guarantee Plan, failed to comply with the Fair Labor Standards Act.

A. Section 2, seventh, and Section 6 of the Railway Labor Act have application only to changes in an existing collectively bargained agreement.

B. There was no collectively bargained agreement in existence between the plaintiffs and the defendant when the plaintiffs were given notice of the Accounting and Guarantee Plan on October 24, 1938.

C. Even assuming a collectively bargained agreement between the plaintiffs and the defendant to have been in existence on October 24, 1938, the notice of that date instituting the Accounting and Guarantee Plan effected no change which would constitute a violation of the Railway Labor Act.

1. The notice of October 24, 1938, related to a subject not covered by the agreement of 1937 or any other collectively bargained agreement respecting red caps.

2. The notice of October 24, 1938, did not effectuate or purport to effectuate any change in the method by which the red caps had received their wages up to that time, but only provided for the payment to them of such additional sums as might be necessary to bring the wages in all instances up to the statutory wage prescribed by the Fair Labor Standards Act.

ARGUMENT.

I.

THE DEFENDANT, AS EMPLOYER OF THE PLAINTIFF RED CAPS, WAS LEGALLY ENTITLED TO APPLY ON THE WAGES DUE FROM DEFENDANT TO THE PLAINTIFFS THE SUMS RECEIVED BY THE PLAINTIFFS FROM THE TRAVELING PUBLIC FOR SERVICES PERFORMED AS DEFENDANT'S EMPLOYEES IN THE COURSE OF SUCH EMPLOYMENT; AND THIS METHOD OF PAYMENT COMPLIED WITH THE REQUIREMENT OF SECTION 6 (a) OF THE FAIR LABOR STANDARDS ACT BECAUSE:

A. Where Compensation is Received by an Employee from the Public for Services Performed as Such Employee in the Course of the Employment, the Employer

and not the Employee is Entitled to Such Compensation and May Direct and Control its Disposition.

The sums which prior to and during the period covered by this action were paid by the public to red caps for their services at or about railroad passenger stations differed from the commonly understood "tip" or "gratuity" in that, unlike tips given to waiters or taxicab drivers, they were not extra or supplemental amounts over and above the price of a service, but were themselves the sole compensation paid for the service, by those who received it, nothing additional being paid to anyone. The defendant's notice of October 24, 1938, expressly referred to them in two places as "remuneration" for service (Pl. Ex. 18, R. 55, 121).

Plaintiffs contend that the sums thus paid by the public to the red caps were gifts, and throughout their brief refer to them as "gifts" (Specifications of Error No. 2, Petitioner's Brief, page 18), and "donations" (Specifications of Error No. 5, Petitioner's Brief, page 19), and speak of their "gratuitous" character (Specifications of Error No. 7, Petitioner's Brief, page 19). The horn-book legal definition of a gift is:

"A voluntary transfer of property by one to another without any consideration or compensation therefor" (28 C. J. 620, citing cases).

"A gift * * * not only does not require a consideration, but there can be none; if there is a consideration for the transaction it is not a gift" (28 C. J. 620).

As stated by this Court:

"A donation is a gift and gratuity, and not a grant * * * founded on a consideration."

Forsyth v. Reynolds, 15 Howard 358, 365 (1853).

Clearly, a payment made as the result of obtaining service, and which would not have been made if the service had not been rendered, is not without consideration, and is therefore not a gift or donation, but remuneration or compensation for the service in the ordinary meaning of those words.

It may possibly be contended that the so-called "tips" given to red caps were a mere token of gratitude for promptness and courtesy. On this view, however, there would be compensation for the promptness and courtesy without any compensation for the actual service itself. The view would require the conclusion that, during the period when red caps were remunerated exclusively by tips, the passengers who employed them were being supplied with a free service by the railroads, and, while making no compensation for that service, were at the same time compensating the employees through whom the service was performed for their promptness and courtesy. Such a view is not only artificial and unrealistic, but would obviously lead to very grave consequences for the railroads. Neither before nor after the red caps were declared employees by the order of the Interstate Commerce Commission have the railroads of this country ever held themselves out as offering a free red cap service to the public. The Interstate

Commerce Commission in a recent decision has expressly held that red cap service is not, and never has been, a free service offered by the railroads to their passengers or included in the price of the transportation (*Stopher v. Cincinnati Union Terminal Co.*, 246 I. C. C. 41, decided June 25, 1941).

The practical result of adopting a view which would entail as one of its consequences that the railroads have been offering or making available to the traveling public free red cap service would obviously impose so onerous a burden on vanishing passenger revenues that it is altogether unreasonable to assume that the railroads ever intended to offer such service free.

Prior to the Commission's decision that red caps were employees, the railroads regarded the service not as one which they themselves supplied but rather as a service which they made it possible for independent concessionaires, the red caps, to render to such of the public as were willing to pay for the same, although the amount was not fixed but left to the discretion of the passenger.

Accordingly, the Court of Appeals found and stated in its opinion (118 F. (2d), at page 326):

"In every case the tip was primarily a compensation for service, and not a gift. The red cap expected nothing unless he served. No passenger ever gave a red cap anything unless there was service. Every passenger paid for service unless he or she was very stingy or financially unable, or else ignorant that pay was expected. The acceptance of service carried an expectation of

reward on both sides. What the red cap received was not gifts but earnings. If they amounted to enough he owed income taxes on them; and they belonged to him, either because the business was his, or if an employe, because his employer conceded them to him" (R. 218).

Plaintiffs refer in their brief to the regulation in effect at the defendant's station, as well as on other railroads, that red caps were not permitted to ask passengers for tips or gratuities (Petitioner's Brief, page 5), and seek to draw from this the ~~inference~~ inference that the service was offered gratis to the public. The regulation does not support such an inference. It was a regulation that red caps were not to enter into controversy with the occasional and unusual passenger who, after receiving the service, failed to pay, and is clearly only a regulation designed to avoid unseemly controversy with patrons and to preserve an atmosphere of courtesy in relations with the traveling public. As such it was imposed as a condition of being permitted to work on the defendant's premises, and it was so understood by the Circuit Court of Appeals, which says in its opinion (118 F. (2d), at p. 325):

"Prior to October, 1938, these red caps, like others at many larger railroad terminals throughout the United States, were selected on their applications, by Jacksonville Terminal Company, furnished with uniforms which included red caps, and permitted to offer their services * * * to the passengers taking or leaving trains; they to

look wholly to the passengers for their pay, but not to demand or argue about it but to take what was offered" (R. 215).

And again (p. 326 of 118 F. (2d)):

"The railroad carriers were not bound to afford any such service to the passenger, and the reward of it was left a matter between red cap and passenger, with the stipulation that the amount should be left to the passenger and there should never be annoyance or embarrassment about it" (R. 217).

"From the standpoint of common experience the best proof that the railroads never intended to offer free red cap service to their patrons is the fact that, if they had made such an offer, the number of red caps maintained in and about their stations would have had to be greatly multiplied. That the service was not intended to be free has always been understood by the traveling public, and persons not intending to pay for red cap service have seldom, if ever, demanded it. Again quoting the words of the opinion of the Circuit Court of Appeals, "the acceptance of service carried an expectation of reward on both sides" (R. 218).

The public authorities which for many years have regulated the transportation service offered by the railroads have never assumed to require the offer, or to regulate the amount, of red cap service.

Since the sums received by the red caps, including the plaintiffs, from the traveling public prior to

October 24, 1938, were thus compensation for the service, it follows that, if the red caps were employees of the defendant during that period, or at any event from the time that they were declared and became employees, such sums belonged to the employer and were subject to his control and disposition.

It is elementary law that the earnings of an employee made in the course of, or as a result of, his services performed as such employee belong to the employer:

"Plaintiff's earnings during the time of such employment would belong to the employer."
(*Leach v. Hannibal & St. Joseph R. Co.*, 86 Mo. 27, 32, 1885.)

"For any service to an outside party which plaintiff rendered for a consideration, the master, and not the servant, would be entitled to recover."
(*Reynolds v. Roosevelt*, 55 Hun 610, 8 N. Y. Supp. 749 (1890).)

The same proposition was laid down and applied in *Morrison v. Thompson*, L. R. 9 Q. B. 480 (1874), where the court, through Lord Chief Justice Cockburn, said (p. 483):

"Profits acquired by the servant or agent in the course of, or in connection with, his service or agency, belong to the master or principal," citing earlier English decisions.

So basic is this proposition that like many other elementary propositions of law there are relatively few decided cases which announce it. One such case is *Sheppard Publishing Co. v. Harkins*, 9 Ontario L. R. 504 (1905), in which the court said at page 511:

"As money obtained by the servant by the sale of time and labor which belonged to his master, and therefore, in contemplation of law, the proceeds of the master's property, his right to follow and demand them may be upheld. *Taylor v. Plumer* (1815), 3 M. & S. 562. I am bound, I think, to hold the profits so made by a servant to be in his hands the property of his master for which the servant must account to him."

Accordingly, plaintiffs' own contention that they were and had always been employes of the railroads at whose stations they served prior to the order of the Interstate Commerce Commission in *Ex Parte* 72, requires the conclusion that during that whole period their compensation received from the public in the course of and as a result of such employment belonged to their employer, and that, if during that period they retained such compensation as their own, this was by the consent and permission of the employer, and in lieu of the wages which the employer might otherwise have been expected to pay to them directly. It is, therefore, unnecessary to go into the question of whether the red caps were licensees or employes before the Interstate Commerce Commission's decision. Certainly, as soon as they became such employes, whether by virtue of that decision or at a prior time, the compensation received by them in the course of the employment belonged to and was subject to the disposition and control of their railroad employers, including the defendant. This, of course, remained true after the enactment of the Fair Labor Standards Act, which required the employer to pay them a specified

wage of not less than certain fixed sums per hour. Again, the language of the Circuit Court of Appeals in the instant case may be quoted (118 F. (2d) at p. 326):

"Since the employer became absolutely bound to pay these sums for those hours and for the labor to be done in them, necessarily the work was his, and the product of it was his. The employer did not have to consent to this, nor did the employe. * * * Because what was received from passengers was not gifts, but pay for services valued by the passenger, it required no consent on the part of the red caps to make the earnings belong to the employer, who was now bound to pay for the time and efforts of the red caps during work hours. The red cap's reward was to be wages. The employer became entitled to his services and what was received for them" (R. 218-219).

B. Even if the Sums Received by Red Caps from the Traveling Public for Services Rendered in the Course of Their Employment Should be Treated not as Compensation from the Public for Such Services, but as "Tips" or "Gratuities,"—Which They Were not,—Nevertheless Where Tips or Gratuities are Received by an Employe in the Course of, and Incidental to, his Employment, the Employer has the Legal Right to Control and Direct the Disposition of Such Gratuities and May Require Them to be Paid Over or Accounted For to Him.

The Circuit Court of Appeals recognized that no precise and uniform definition of tips is to be obtained.

from dictionaries or the language of decided cases. As the Court states in its opinion (118 F. (2d) at p. 326):

"It would seem that a tip may range from a pure gift out of benevolence or friendship,* to a compensation for a service measured by its supposed value but not fixed by an agreement. Most often the term is applied to what is paid a servant *in addition* to the regular compensation for his service, to secure better service or in recognition of it" (R. 217).

It has been established in the immediately preceding section of this brief that the sums paid by the traveling public to red caps, whether or not properly described by the term "tips," belong at that end of the scale where the term describes "compensation for a service," and this differ from the tips paid to waiters and taxicab drivers, which are in addition to the regular compensation for the service. However, even if this difference should be ignored, and the "tips" paid to the red caps be treated as on all fours with the extra or supplemental payments by patrons to waiters and taxicab drivers, the legal consequence still follows that the employer has a right to control the disposition of such sums received by the employe in the course of, and as a result of, the employment, and may either forbid the employe to receive such tips or require that they be turned over to the employer.

* In this connection may be cited the familiar literary employment of the word to describe the gifts to English schoolboys by their parents' friends.

It has been held that an employer may require, as a condition of employment, that an employe shall turn over to him amounts received as tips in the course of the employment: (*Gloyd v. The Hotel LaSalle Co.*, 221 Ill. App. 104 (1921)). In *Ex Parte Farb.*, 178 Cal. 592, 174 Pac. 320 (1918), it was held that a state legislature may not constitutionally deprive an employer of the right to impose such a requirement. The same case held that an employer may forbid an employe to accept any tips under pain of dismissal for disobedience. To the same effect is *Powers' Case*, 275 Mass. 515, 176 N. E. 621 (1931). Statutes have been sustained and applied which fully recognize this right of the employer to forbid his employes to accept tips, and which penalize certain classes of employers, such as hotels, restaurants, railroad companies and sleeping car companies, that allow employes to receive tips. *Laws of Mississippi*, 1912, ch. 136, construed in *State v. Angelo*, 109 Miss. 624, 68 So. 918 (1915).

In *Sloat v. Rochester Taxicab Company*, 177 App. Div. 57, 163 N. Y. Supp. 904 (1917), (aff'd without opinion, 221 N. Y. 491, 116 N. E. 1076 (1917)), the court, in estimating the weekly benefits due to a taxicab driver under the New York Compensation Law, decided that tips were a part of his wages and held that an agreement with the employer to that effect may be implied from a common custom or understanding in the business. The court said (163 N. Y. Supp., at pp. 905-6):

"There was a custom existing in the City of Rochester whereby users of taxicabs, upon paying

their fare, gave to the drivers, gratuities or tips, which is an amount in addition to the fare, and for the personal use of the driver; that such custom was known to the employer at the time he employed Warren Sloat to enter his service; that the average amount of tips so received * * * was the sum of 85 cents a day, which sum he was allowed to keep for his own use, and was not required to account to his employer for the same. * * *

"It is urged that these tips were received, not from the employer as wages, but from the patrons of the taxicab, as a gratuity or gift to the driver * * * The employer and employee knew that an average of about 85 cents per day would be received from tips, and clearly the compensation paid by the employer was based upon that assumption. If the employee had turned the tips over to the employer, as probably would have been his duty in the absence of an understanding to the contrary, the wages of the employee undoubtedly would have been \$17.10 a week. If the employee receives from the employer \$12.00 and retains the \$5.10 tips, he is getting through or from the employer \$17.10 per week; and if the employer paid the employee \$17.10 a week, and the tips were turned over to the employer, the result to each would be the same. Neither the employer nor employee contemplated that the employee should receive but \$12.00 for his services; each expected that he would receive on an average \$17.10 per week.

"The employee could not have received the tips if the employer had not put him in the way of getting them, and we may well conclude that the

tips were an advantage received from the employer similar in effect to board, lodging, or rent furnished in addition to the money wages paid.

* * * The usual tips have come to be considered a part of the cost of the entertainment at a hotel or upon a sleeper or public conveyance, and it is realized both by the person paying and receiving them that it is a part payment of the wages, which the employer compels the person served to pay. In effect, therefore, the employer, and not the employe alone, is benefited by the tip usually paid. * * * The whole theory of tipping, as at present understood in the usual practice, is a payment made in order to get reasonable service, and is an exaction made or permitted by the employer, so that his patrons shall help him pay the wages which is fairly due from him to his employe. The custom and the manner in which the payment of tips is enforced and practiced leads inevitably to the conclusion that, in substance, the tips received are a part of the wages of the employe, and are advantages received by the employe from the employer as a part recompense for services rendered. * * *

Award affirmed."

Similarly in *Bryant v. Pullman Company*, 188 App. Div. 311, 177 N. Y. Supp. 488 (1919) (aff'd without opinion, 228 N. Y. 579, 127 N. E. 909 (1920)), it was held that tips received by a Pullman car porter are understood by the porter and the company to be part of his wages and should be considered as such in determining the compensation to which he is entitled under the same Workman's Compensation statute. The Court said (177 N. Y. Supp., at p. 489):

"It is urged, however, that the award rested upon a wrong basis as to tips received by the porter, which were treated as a part of his wages, and an ingenious, but unsuccessful, attempt is made to distinguish this case from *Sloat v. Rochester Taxicab Company*, 177 App. Div. 57, 163 N. Y. Supp. 904. It is urged that in that case it was understood that the tips were to be a part of the compensation. The facts in this case overwhelmingly point to the same result. * * * Such is the common understanding. The award should be affirmed."

In *Gross' Case*, 132 Me. 59, 166 Atl. 55 (1933), the issue on appeal was whether, in ascertaining the average weekly wages or earnings of a waitress, tips received and retained by her should be considered. It was undisputed that under her contract of employment she could retain her tips. The Board included her tips and found her average weekly wages to be \$17.13. After considering and citing from many compensation acts and the decisions thereunder, under which tips were included in the computation to arrive at the average weekly wages of the employe, the court pointed out (166 Atl., at p. 56):

"A further provision of our act is that, in determining the compensation to be paid, benefits received from any other source than the employer shall not be taken into consideration."

Thereupon the court, quoting from the *Sloat* case, *supra*, to the effect that the "whole theory of tipping" is that the patrons thereby help the employer pay the employe's wages, held that the tips were properly included as wages, and dismissed the appeal.

At this point it is appropriate to call the Court's attention to language used in Judge Waller's opinion in the instant case in the District Court. In that opinion Judge Waller said (35 F. Supp. at p. 270):

"In the instant case it has not been disputed that the station and the passengers were facilities furnished by the employer without which there would neither be employe nor wages.

"The terminal station, with all its facilities, belonged to the defendant. It had the legal right to deny the use of those facilities to persons who would use it as a place of business. It likewise had the legal right to extend a privilege to any one it saw fit who would observe appropriate rules and regulations and otherwise observe the conditions under which the privilege or license was granted. It had the legal right to exact payment from concessionaires using its facilities for profit, and to require the observance of its known and reasonable regulations; or it had the legal right to waive the payment of a consideration. * * *

"However, if we concede that they were employes and within the Act, we would still find that, in cash paid directly and through the facilities furnished by the employer, plaintiffs have been paid, in the aggregate, considerably in excess of the minimum wages required by said Act. *It would seem immaterial whether the employe was paid by the employer directly or whether he was paid through an instrumentality or facility set up for his use and benefit by the employer.* The question is, did he receive, either directly or indirectly, for his services a sum not less than the minimum required by the Act. * * * (R. 200-20). (Emphasis supplied)

Plaintiffs in their brief (Petitioner's Brief, page 32) cite *Polites v. Barlin*, 149 Ky. 376, 149 S. W. 828 (1912), and *Zappas v. Roumiliote*, 156 Iowa 709, 137 N. W. 935 (1912), in support of the proposition that tips are the absolute personal property of the employes in such sense that the employer has no right of control over them. Those cases do not rest upon or establish that proposition. What they do establish is simply that the employe is entitled to retain the tips so long as the employer has not exercised his right of control by explicit and proper notice to the employe, and so long as it cannot be shown that the employer has by such notice established, as a condition of the employment, a requirement that the employe shall turn over the tips to him. The holdings of both cases, understood in the light of their facts, mean no more than that an employe cannot be held to a rule or regulation of the employer not properly brought to his attention and so not forming a part of his individual employment contract. There was in one, if not both, of these cases the added element of concealment by the employer, and more than a suspicion that an advantage had been taken of an ignorant foreigner who could not speak the language.

These cases thus do not deny, but on the contrary expressly affirm, the right of the employer, by proper notice to the employe, to make it a term of the employment contract that the employe shall henceforth, if he continues in the employment, turn over his tips to the employer or account for them.

There was a similar absence of prior notice by the employer, and so of an exertion of his right to control the tips or commissions, in the other three cases cited by plaintiffs in their brief (Petitioner's Brief, page 33), viz.: *M'Rae v. M'Beath*, 5 N. B. 446 (1847); *Gay v. Paiye*, 150 Mich. 463, 114 N. W. 217 (1907); and *Aetna Insurance Co. v. Church*, 21 Ohio St. 492 (1872). The decisions in all these cases were concerned with a question not in issue here, viz., whether, *in the absence of proper notification to the employe*, tips or commissions belong to the employer or to the employe—i. e., whether the employer's explicit permission is necessary before the employe may lawfully retain the tips or commissions, or whether, on the other hand, the employe may lawfully retain them until he has received explicit notice from the employer to the contrary. This question is not involved in the case at bar. The decisions cited do not challenge in any way the employer's right to control the status of tips; they merely involve the question of when and how the employer's right to demand payment over of the tips is to be exercised. The issue upon which they thus turn is not presented in the case at bar, since here there is no dispute as to the right of the plaintiffs to retain the tips which they received, prior to the full and explicit notice given them by the defendant on October 24, 1938.

The service of that notice upon each of the plaintiffs was an express assertion of the defendant's right of control with respect to tips, and notified them specifically that it was by the defendant's consent

that they were permitted to retain the income derived by them from serving the defendant's patrons. The notice, although it permitted the red caps to retain the tips precisely as before, was a definite direction and order from the employer to the employee which placed the status and ownership of the tips beyond doubt.

The record shows that after the receipt of the notice each of the plaintiff red caps continued to work on the premises of the defendant and duly complied with the notice by making daily reports of the tips which he received. The defendant complied with its guarantee set forth in the notice by paying to the plaintiffs the difference, if any, between the amounts which they received from the public and the amount of their statutory minimum wage, and the plaintiffs received, and accepted these payments in accordance with the terms of the notice (Def. Bill of Partic., R. 13-44).

The right of a carrier-employer of red caps in the position of the defendant to control the disposition of the tips received by the red caps from the public has been forcefully expressed by Judge Otis in his opinion in *Harrison v. Kansas City Terminal Railway Co.*, *supra*. His language is as follows:

"Defendant was under no obligation to employ redcaps. In the great majority of railway stations no such service is provided. *When the defendant did employ redcaps it had the right to fix the conditions of their employment (except as Congress legally may have prescribed conditions). It had the right to say what duties they should perform, how they should perform them, when they*

should perform them. It had the right to say whether they should take or refuse tips when offered. It had the right to require them to turn over to it all tips received" (36 F. Supp., at p. 438)." (Emphasis supplied).

After referring to the employer's notice, which was in all respects like the defendant's notice of October 24th, but which in the *Kansas City* case was dated October 21, 1938, and to the fact that the red caps continued to work under the notice, Judge Otis proceeds as follows:

"They" [*i. e.*, the red caps] "consented and agreed to whatever clearly was stated in the announcement and to whatever clearly was implied in what was stated. None seriously would contend that the red caps did not understand that the defendant intended that after October 21, 1938, tips should be counted in the calculation of minimum wages to be paid as required by the Fair Labor Standards Act. None seriously would contend that the red caps did not understand that the defendant by its announcement asserted rights to and an interest in tips received. It did that when it required that such tips should be reported daily (no employer would require an employe to report gifts in which the employer had no interest). It did that when it specifically made it known that tips were to be included in compensation guaranteed. Especially did it do that when it advised the red caps that they were 'privileged to retain * * * tips.' To grant a privilege is to assert the right to grant it. To grant the privilege of retaining tips is to assert the right to demand that they be paid over. The privilege

of retaining tips was granted but the grant was not unconditional. *The red caps understood what the condition was. They understood and they accepted it. They were to retain the tips subject 'to their being credited on such guarantee.' On what guarantee? On the guarantee that the compensation of each red cap 'will not be less than the minimum wage provided by law.' Here was an assertion by the defendant of a claim it had a right to assert, a claim to the tips received by the red caps. Here was an arrangement by which the red cap, when he had received a tip, held it in his custody for the benefit of his employer until he had given his employer credit on his wage, after which it become his separate property"* (36 F. Supp., at p. 349). (Emphasis supplied)

The foregoing discussion by Judge Otis of the red caps' acceptance of the notice of the Accounting and Guarantee Plan involved in their continuing to work thereunder, and in their acceptance of the benefits of the plan, leads to the next proposition of this argument, viz.:

C. Since the Defendant as Plaintiffs' Employer was Lawfully Entitled to Control and Direct the Disposition of the Sums Received by the Plaintiffs from the Traveling Public either as Compensation for Services Rendered in the Course of the Employment or as "Tips" or "Gratuities," Defendant was Entitled, in the Absence of a Collective Agreement with the Plaintiffs to the Contrary, to Exercise Such Control and Alter the Disposition of Such Sums without Obtaining any other

Consent from the Plaintiffs than Was Implicit in their Continuing to Work during Pay Periods after the Altered Disposition of Such Sums had been Notified to Them, and in Their Acceptance of the Benefits Conferred by Such Notice.

The quotations reproduced in the foregoing section of this brief from Judge Waller's opinion in the District Court in the instant case, and from the opinion of Judge Otis in the *Kansas City* red cap case, state clearly and forcefully the right of the employer to assert and exercise by due notice to his employes his control over the tips received by them from the employer's patrons in the course of their employment. Of course, the employe, after receiving the notice and being thereby informed of the condition with respect to tips thereafter to be attached to his employment, is free to leave the employment if he does not like the condition and is unwilling to accept it, or be employed on such terms. If he does not do so, however, and instead continues in the employment from pay-day to pay-day thereafter, he must be taken to have accepted the employment on the terms and conditions set forth in the notice, and thereafter those terms and conditions become part of his individual employment contract.

A different question would, of course, be presented if at the time of the notice the employe was working under a collectively bargained agreement with the employer, and if the notice purported to alter some provision or provisions of that agreement. This is

not, however, the situation at present under consideration. No question of a collectively bargained agreement purporting to be in effect and to cover the plaintiffs on October 24, 1938, when the defendant issued the notice putting the Accounting and Guarantee Plan in effect, was presented to either of the courts below in the instant case. In so far as that question has now been raised for the first time in this Court, it will be argued in the final section of this brief (pp. 136 to 158, below). In the present section the argument is confined to the proposition that, leaving the question of such collective agreement aside, the only consent of the plaintiffs needed to make the notice of October 24th effective and to incorporate the provisions of that notice in their individual employment contracts, so that they were subsequently bound thereby, is the consent implicit in their continuing to work during pay periods after their receipt of the notice, and in their acceptance of the additional payments from their employer which the notice guaranteed.

The necessity for making any argument in support of what seems so plain a proposition of elementary law arises only from the misconceptions in which Judge Atwell in the District Court for the Northern District of Texas became involved in deciding the case of *Pickett v. Union Terminal Co. of Dallas*, 33 F. Supp. 244 (1940), now on appeal in conjunction with the instant case. These misconceptions were the basis of Judge Atwell's decision of that case in favor of

the red caps in the District Court, and, although that decision was reversed by the Circuit Court of Appeals concurrently with its decision in the instant case, 118 F. (2d) 328 (1941), Judge Atwell's opinion, which is the only opinion so far handed down by any court supporting the claims of the red caps, requires examination in order to remove the misunderstandings to which it has given rise and upon which the plaintiffs may attempt to rely in argument here, as they did in the courts below.

Judge Atwell in his opinion expressed the view that, whatever the right of an employer to control the disposition of tips, nevertheless, if he has in fact permitted such tips to be retained by the employees over a period sufficiently long to make such retention a matter of practice, he may not thereafter change the practice without the consent of the employees given in the form of an express contract, and that, if no such express contract has been entered into by the employees, the employer's attempt to change the practice by the giving of notice is ineffectual, even if the employees, after receipt of the notice, continue to work from pay-day to pay-day and accept the benefits which the notice purported to confer. This appears to be the meaning of the following language from his opinion (p. 248 of 33 F. Supp.):

"For more than thirteen years they" [*i. e.*, the red caps] "had been working together as heretofore indicated; the red caps being paid entirely by tips which they received from the public, when they were paid at all. That arrangement could

not be optionally terminated by one party without the consent and agreement of the other."

If this language means that employees who previously, without receiving direct wage payments, had been permitted by their employer to receive and retain tips as their own property, could not thereafter be required by the employer, upon due notice, to treat the tips so retained as their employer's property applicable to the payment of wages which they were thenceforward to receive, unless the employees made an express contract to that effect, and even though they continued to work under the notice and take advantage of the guarantee which it proffered, then it is submitted that the statement is simply an erroneous expression of the law.

It is well settled by the authorities reviewed above that an employer may forbid an employee to accept any tips, under pain of dismissal for disobedience. Legislatures have required that employers whose employees have previously accepted tips shall from the date of the enactment forbid them to do so, and have penalized employers who fail to comply with the statute and do not enforce such prohibition against employees (see p. 70 above). Obviously an employer would have no such right, nor could the legislature compel him to exercise such a power, if employees who had previously been permitted by their employer to receive and retain tips on their own account could not lawfully be deprived of the privilege, except by their own consent given in the form of an express

contract, as Judge Atwell held. To say that employees who have been permitted by their employer to receive tips must continue to be allowed to receive them, or must continue to be allowed to treat as their own property compensation which the employer has permitted them to retain in the past, is to say that the employer by once granting such permission has thereafter permanently disabled himself from exercising the legal power which he admittedly has over the tips and compensation in question.

Obviously this is not the law. If it were, the anti-tipping statutes would be unconstitutional wherever an employer had previously permitted tipping, and would thus fail completely of their purpose, since the employees would have a vested right which the statute would impair. Since the employer has a legal right of control over money received by his employees from his patrons in the course of their employment, either as gratuities or as compensation for their services as such employees, he is necessarily entitled to exert such control by changes in his rules or regulations applicable thereto upon proper notice of such changes to the employees. This is but an illustration of the general right of the employer to change from time to time the rules and regulations applicable to the employment and to the conduct of his business, and of the duty of the employee, when duly notified of such changes, to comply therewith so far as such changes are reasonable. Clearly it is not necessary, in the absence of a collective agreement to the con-

trary, that an employer, who has pursued certain methods or practices in the conduct of his business, should thereafter have to secure the consent of his employes in the form of an express contract with them before making any changes in those practices.

Possibly a distinction might be drawn between cases, on the one hand, where an employer has contracted with a particular employe or group of employes to keep them in his employ for a definite period of time, say, a year or five years, and, on the other hand, cases where the employment, as is true of red caps, is an employment at will or at most from pay-day to pay-day. In the former type of case it might be argued that the terms of the contract should be construed to incorporate certain particular practices, as, for example, those affecting compensation, so that as to those the employer could make no alteration during the period of the employment without the consent of the employe. The argument would be that the employer could not alter those conditions of work which could properly be treated as an essential term of the contract, because the employe is bound on his part to continue in the employment during the entire duration of the contract and can be held to that obligation by the employer, so that the employe on his own part is entitled to have the contract continue unchanged in essential respects during the period for which he is bound. Even, however, in respect of an employe whose contract of employment is for a fixed period, it has been held that the employer, by establishing new rules and

regulations, and duly notifying the employe thereof, may lawfully effect important changes in the employe's working conditions for the remainder of the duration of the contract. *Marks v. Cowdin*, 175 App. Div. 700, 162 N. Y. Supp. 567 (1916); *Smith v. Herring-Hall-Marvin Co.*, 115 N. Y. Supp. 204 (1909); *Peniston v. John Huber Co.*, 196 Pa. 580, 46 Atl. 934 (1900). In a case of that character it has been said:

"The law is that a master is entitled to direct how a servant shall perform his duties, and in so doing is entitled to consult his convenience as well as the interest of the business and to prescribe such hours of work for each employe as shall in his opinion best conduce to the efficient administration of the business as a whole. So long as such directions are not unreasonable * * * the servant is bound to obey them." *Macaulay v. Press Publishing Co.*, 170 App. Div. 640, 155 N. Y. Supp. 1044, 1047 (1915).

But, whatever might be the case with respect to employes hired for a fixed period of some duration, there is clearly no limitation upon the employer's right to alter his practices affecting employes whose employment is terminable at will or on any pay-day. The contract of such employes, having no longer duration than the interval between pay-days, cannot operate to prevent the employer from making rules and regulations which change the conditions of their employment, since the employes must necessarily be regarded as accepting the change if they continue in the employment after the next ensuing pay-day.

Such employes, who are employed from pay-day to pay-day and who are under no obligation to continue in the employment longer than they see fit, have no lawful reason to complain of a change in the working conditions or practices of their employment, because they may leave the service at once if they do not like the change. This is the plain common law of the subject: see, e. g., *The King v. St. John*, 9 B. & C. 896, 109 Eng. Rep. 333 (1829); *Spain v. Arrot*, 2 Starkie 256, 171 Eng. Rep. 638 (1817). As stated in *Donnellan v. Halsey*, 114 N. J. L. 175, 176 Atl. 176, 177 (1935):

“If the relationship existing between the parties was based on a contract * * * terminable at the will of each party it necessarily follows that it was subject to modification at any time as a condition of its continuance.”

It was accordingly held in that case that an employe whose employment was thus terminable at will, and who was paid in part by a percentage of profits from the business, was bound to accept a reduction in such percentage when he continued in the employment after notice thereof. In *Painter v. Durham*, 195 Ill. App. 468 (1915), the court stated the rule as being to the effect that if, after notice of the proposed change in the terms of an employment, an employe continues in the service of the employer, he is presumed to have assented to the new contract.

In *Shuppan v. Peoria Ry. v. Terminal Co.*, 30 F. (2d) 569 (C. C. A. 7th, 1929), the general manager

of a railroad, upon its release from Federal Control, found that the road could not operate on the wages which had been fixed during the period of Federal Control. He advised the men of this fact and told them that they must either accept a wage-cut or apportion the income of the company among them (after deduction of the cost of current supplies, etc.), or quit the employment. The employees refused to accept any of the proposed alternatives. Thereupon the general manager posted a notice, which, after reciting what had taken place, announced that, beginning on a certain date, the employees "will receive on each pay day your proportionate share of the current income of the Company after allowing for the payment of current bills for fuel, supplies, etc., and that the amount you so receive on each pay day will constitute your full and final compensation for the period covered by such pay day." The employees' committee wrote the general manager advising him that the employees would not accept a less rate of pay than that previously in effect. The company thereafter paid the men in accordance with the formula announced by the general manager in the bulletin, the amounts so paid varying on different pay-days from seventy-five to eighty-two per cent of what the employees had previously received. The checks were stamped in full for services to date. Some of the employees protested individually, and several times the employees' committee filed a formal written protest. But the men continued to work. The Circuit Court of Appeals affirmed the judgment

of the District Court, disallowing a claim by the employes for the difference between the former wage and the amount which they had received, saying:

"Clearly there was no formal contract between the company and the employes that they would accept a smaller wage than they had been receiving. Looking, however, to the conduct of the parties, the conclusion is inescapable that they did so contract. At the meeting of February 17 the company through its general manager told the employes that operation on the existing basis was no longer possible, and set forth the terms upon which operation might be continued. Offered the alternative of accepting a wage cut or leaving the service, the men reported apparently to the effect that the wage cut was not acceptable. Still, no one left the service. By remaining in the employ of the company, they manifested more positively that the proposal that they leave the service was not acceptable."

Another case which holds that, by continuing in the service, the employee accepts a new condition of employment of which notice has been given him by the employer, even though he may expressly protest against it, is *L. G. Balfour Company v. Brown*, 110 S. W. (2d) 104, 107 (Tex. Civ. App., 1937), where the court said:

"Appellee continued in appellant's service with full knowledge of the new schedule of commissions and bonuses provided for in the letter of August 22, 1934; but of course this continued service was not without protest; however, an

earnest protest was not sufficient, he was called upon to act; this he did by continuing in the service."

If an attempt should be made to establish as a rule of law that, where employes are simply employed from pay-day to pay-day, the employer cannot with respect to such employes change any rule or practice affecting the employment which has been applied in the past unless the employes, by express contract, consent to such change, the extraordinary result would follow that employes who are under no obligation to remain in the employment, and who can leave it at any time, would have a right, by withholding their express consent to proposed changes, to dictate the business practices of the employer beyond the period during which they are bound to remain in his employ. Such a rule would be lacking in the element of reciprocity of obligation which is basic in the very conception of a contract.

Whether or not the legislature could impose such a rule for the benefit of unorganized employes and in the absence of a collectively bargained agreement, it is clear that, until now, this has not been done. To say that in the absence of a collective agreement an employer may not change practices and establish new rules and regulations without obtaining the express consent of the employes affected, is to say nothing less than that without a collective agreement employes have the very right which it is often one of the principal purposes of a collective agreement to obtain for them. It is to say, in substance, that the mere

fact of their employment, although for no specific duration and although regulated by no collective agreement, gives them as unorganized individuals the same right as that which they could obtain from a collective agreement only if the agreement contained a provision to that effect.

The untenable and impractical character of such a view is disclosed by the consequences which it would entail. Suppose, for example, that an employer has permitted a certain practice affecting a given class of employes, and then announces an alteration in the practice effective from the next pay-day. Suppose it should be decided as a rule of law that the alteration may not be put into effect by the employer without obtaining the consent of the employes given in the form of an express contract. From whom are the consents to be obtained? With whom is the contract to be made? By hypothesis, the employes are unorganized. Must the employer treat with them individually? Suppose that he obtains the consent of some and not of others; is he prevented from putting the change into effect without obtaining the consent of all? On the other hand, if the change could be made effective only as to those employes who were willing expressly to consent to it, and not as to those who refused their consent but still insisted on remaining in the employment, the lack of uniformity which would result with respect to different individual employes might well have the practical effect of preventing the change from being put into operation. The result would be that a small group, or possibly

even a single employee, would have a veto over the introduction of the change.

In the light of what has been said, it is clear that, at least as to employees not working under an express contract of employment for a fixed term of substantial duration, the employer by notice duly given to the employees may alter the terms and conditions of the employment, unless the alterations in question violate the provisions of an existing collectively bargained agreement with those employees, or unless the new terms and conditions established by the notice are for any reason contrary to law.

In saying that the employer is prevented from putting into effect new terms and conditions which violate the provisions of an existing collectively bargained agreement, it follows that the collectively bargained agreement must actually be in existence at the time the proposed change is announced, and that it must actually contain a provision with which the proposed change comes into conflict. Clearly the impediment does not exist either if there has been no collectively bargained agreement, or if such an agreement exists but contains no provision which the change would violate. These consequences follow from elementary principles of contract law. Clearly, if a collectively bargained agreement is not yet in existence, it cannot be treated as having any of the effects which an existing agreement would have. Accordingly the mere fact that proposals had been made which might ultimately lead to the conclusion of such an agreement, or the fact that negotiations had been

commenced, cannot be treated as having the same effect as a completed agreement, since they might well prove abortive and no agreement result. In any event, until the agreement is actually concluded, it cannot be certain what terms it will contain and whether or not a particular alteration in working conditions will contravene any of the terms of an agreement still *in futuro*.

A fortiori, the mere fact that an individual or organization may have approached an employer, claiming to be the representative of a group of employees with whom a collective agreement has not yet been made, cannot be held to have the same legal effect as a completed agreement might have in preventing the employer from thereafter making any changes in his working rules. Up until the time that an agreement is actually completed, there can be no impediment to the employer's making such changes, for there is no agreement in existence which those changes might contravene, and, when the agreement is subsequently made, the employees have their opportunity to negotiate the question of whether the change shall thereafter be kept in effect.

Precedent as well as principle supports the proposition that, where no collectively bargained agreement has as yet been entered into, the employer may on his own initiative fix and alter rules, working conditions and rates of pay, and the new rules, conditions and rates so established thereafter become a part of the individual employment contracts of the employees.

who continue to work thereunder. This has been specifically decided under the provisions of the Railway Labor Act in *Virginian Ry. Co. v. System Federation No. 40*, 300 U. S. 515, 57 S. Ct. 592 (1937), where this Court, speaking through Mr. Justice Stone, said at pages 548-9:

"We think, as the Government concedes in its brief, that the injunction against petitioner's entering into any contract concerning rules, rates of pay and working conditions, except with respondent, is designed only to prevent *collective bargaining* with anyone purporting to represent employes, other than respondent, who has been ascertained to be their true representative. When read in its context it must be taken to prohibit the negotiation of labor contracts, generally applicable to employes in the mechanical department, with any representative other than respondent, but *not as precluding such individual contracts as petitioner may elect to make directly with individual employes.*" (Emphasis supplied).

In that case, a specific labor organization, viz., the respondent "System Federation No. 40," had been certified by the National Mediation Board to the employer as the authorized and accredited representative of a certain class of employes for collective bargaining purposes. This organization brought suit, alleging, among other things, that the employer threatened to negotiate and conclude a collective agreement with another and different labor organization as the bargaining representative for the same employes. This, the Court held, the employer might

not do, but limited the scope of the injunction in the sense indicated in the passage from the opinion quoted above. The portion of the Government's brief approved in that passage, and cited by the Court in a footnote (p. 548), reads in part as follows:

"When the majority of a craft or class, has (either by secret ballot or otherwise) selected a representative, the carrier cannot make with anyone other than the representative a *collective contract* (i. e., a contract which sets rates of pay, rules or working conditions), whether the contract covers the class as a whole or a part thereof. Neither the statute nor the decree prevents the carrier from refusing to make a collective contract and hiring individuals on whatever terms the carrier may by unilateral action determine. In hirings of that sort the individual does not deal in a representative capacity with the carrier and the hiring does not set general rates of pay, rules or working conditions."

In other words, as the passage just reproduced indicates, since a collective contract may never eventuate, it is clear that, until such a contract is made, the employer is free to determine the rates of pay, rules or working conditions applicable to his employees by terms incorporated in their separate individual contracts of employment, even after a collective bargaining representative has been duly authorized and accredited. The thing which such authorization prevents him from doing is merely the making of a collective agreement with any other representative or alleged representative.

On the facts of the case at bar, as summarized in the Statement above (pages 24-34, *supra*), it is not possible for the plaintiffs to claim either that negotiations were in progress, or even that anyone purporting to act as the plaintiffs' representative had yet approached the defendant, at the date when the Accounting and Guarantee Plan was put into effect. The notice instituting that plan was delivered to the plaintiffs before October 24, 1938. It was not until October 25, 1938, that Wooten advanced his claim to represent the plaintiffs, and it was not until after he had secured proper authorizations from them on November 3rd that his claim was recognized by the defendant. Only after that date did actual negotiations begin. Even, therefore, if the mere existence of an authorized collective bargaining agent or the commencement of negotiations should be held—as is clearly not the law—to prevent an employer from introducing changes in the working conditions affecting the employees represented, this impediment did not exist at the time of the notice of October 24th. The fact, therefore, that the plaintiffs continued in their employment after receipt of the notice, and accepted during the entire period covered by this action the payments from the defendant which the notice proffered, must be held to have constituted whatever consent on their part was needed to make the notice operative. Only if there was actually in existence on October 24, 1938, a collective bargaining agreement between the plaintiffs and the defendant,

and only if the notice of October 24th attempted to effect a change in some term of that agreement, can the plaintiffs claim that something more than their continuance in the employment was needed to make the notice effective. This claim will be dealt with in the final section of this brief.

It has been pointed out above that a second limitation upon the right of an employer to introduce a change in conditions of employment by notice to the employees is that the new terms and conditions established by the notice must not be contrary to any law. The argument is thus brought around again to the basic question in the case at bar, namely, whether the method of wage payment introduced by the notice of the Accounting and Guarantee Plan complies with the requirements of Section 6 (a) of the Fair Labor Standards Act.

D. The Defendant, by Permitting the Plaintiffs as its Employees to Retain as their Own, Sums over Which the Employer had a Legal Right of Disposition and Control, and by Making up to the Plaintiffs any Deficit Between Such Sums and the Minimum Statutory Wage, Has "Paid" Them in Accordance with the Requirements of Section 6 (a) of the Fair Labor Standards Act, and Such Payment Fully Complies with the Requirements of that Section as Reasonably and Properly Interpreted in the Light of the Policy and Intent of the Congress.

Granting that there were contracts of employment between defendant and plaintiffs providing that the

defendant should pay, and the plaintiffs receive, wages in the form and amounts provided by the Accounting and Guarantee Plan, such a contract would of course not be binding on the plaintiffs if its effect were to require plaintiffs to receive less wages from the defendant than they have a statutory right to receive under Section 6 (a) of the Fair Labor Standards Act.

On the other hand, if the method of wage payment followed under the Accounting and Guarantee Plan had the effect of bringing about the actual payment by the defendant to the plaintiffs of the full amount of the statutory wage prescribed by that section, then plaintiffs have no cause of action in this suit brought under Section 16 (b) of the Act, whether the Accounting and Guarantee Plan was incorporated in their contracts of employment or not; for the cause of action on which they are here suing is not a claim under a contract of employment, but simply a claim that they have not received from the defendant the full amount of the statutory wage. They did their work and were paid for it in a certain manner. If that method of payment gave them all that they were entitled to under the statute, they have no cause of action under Section 16 (b), whether they accepted the Accounting and Guarantee Plan or not.

The central question in this case is, therefore, whether or not it was lawful for the defendant as employer of the plaintiff red caps to apply on the wages due under Section 6 (a) from the defendant to the plaintiffs the sums collected by the plaintiffs

from the traveling public for services performed by them as defendant's employees and in the course of such employment.

In approaching this question it is not helpful to use the route of juggling abstract verbal definitions of "tips" and "wages," and asking the question "whether tips are or are not wages." The question is not whether "tips" are wages, but whether the method by which the plaintiffs were compensated by the defendant complies with the Fair Labor Standards Act. There is no question that the plaintiffs were in fact compensated for their work in amounts equal to or in excess of the statutory wage. The only question is whether they were compensated by the defendant as required by the provision of the Act that "every employer shall pay to each of his employees * * * wages" at the specified rates. Were the plaintiffs actually paid wages at the specified rates by their employer, the defendant, or not?

1. It is clear in the first place that the plaintiffs were not paid by the direct manual delivery by the defendant to them of money from its own treasury in amounts equal to the statutory wage. The first question which arises is accordingly whether the Act in using the words "pay wages" necessarily requires the direct delivery of money in the specified amount by the employer to the employee?

2. A second question,—which is but an alternative method of restating the first,—is whether or not an

employer may lawfully discharge his statutory obligation to pay wages by causing or permitting the employe to collect and retain as his own, money which is collected for the employer's account or over which the employer has a legal right of disposition and control, instead of requiring the employe to hand over such money to the employer so that the latter may then use the same to pay wages to the employe by direct manual delivery of the money.

3. Finally, the answer to the two foregoing questions is obviously to be found in an interpretation of the statutory words in accordance with, and in the light of, the purpose and intent of the Congress. Is the Congress properly to be held to have intended by the use of those words that, where the employer has caused or permitted the employe to receive the full amount of the statutory wage by the method described in the preceding paragraph, the employer must nevertheless, in addition thereto, pay to the employe, by direct delivery of money from its own treasury, a further amount equal to the full statutory wage?

For the purpose of this argument the first and second of the foregoing questions will be discussed together, and will be followed by the discussion of the third question as to the intent of the Congress.

1. THE WORDS IN WHICH THE STATUTORY OBLIGATION TO PAY WAGES IS EXPRESSED, WHEN GIVEN THEIR NORMAL AND ORDINARY LEGAL MEANING, DO NOT REQUIRE THE MANUAL DELIVERY OF MONEY DIRECTLY BY THE

EMPLOYER TO THE EMPLOYEE IN AMOUNTS EQUAL TO THE STATUTORY WAGE RATES, SINCE ON PRINCIPLES OF COMMON LAW A DEBT, AND HENCE A WAGE, MAY BE "PAID" NOT MERELY BY THE DELIVERY OF MONEY, BUT ALSO BY THE TRANSFER TO THE CREDITOR OF CERTAIN KINDS OF CLAIMS AGAINST THIRD PERSONS, VIZ., CHECKS, IF THESE RESULT IN THE RECEIPT OF MONEY FROM SUCH THIRD PERSONS, AND A FORTIORI BY SURRENDERING OR FORGIVING TO THE CREDITOR AN OBLIGATION TO ACCOUNT FOR MONEY WHICH THE CREDITOR OWES TO THE DEBTOR.

Clearly it would be as impractical as it would be unreasonable to construe the statutory obligation imposed by the words "shall pay" so technically and artificially as to require in all cases direct manual delivery of money by the employer to the employee. Such a construction, for example, would outlaw payment of wages by checks, which is simply a transfer by the employer to the employee of a portion of the employer's claim against a third party, the bank. That method of payment will of course ultimately result in the employee's receiving money from the third party, but is not itself a payment of money. It is only the transfer of a claim which the employee can convert into money.

If an employer may thus make a valid payment of the wages due his employee under the Act by transferring to the employee a claim against a third party, it follows *a fortiori* that the employer may with equal validity make payment under the Act by surrendering

and cancelling a proper claim for sums due him from the employe to whom the wages are to be paid. This is no more than is allowed by the law when a debtor who is sued on his obligation is permitted to set off against it a valid claim which he has for money due from his creditor.

The right of an employer to set off against his employe's wages a valid claim which he has for money owed him by the employe has been recognized in the cases. For example, an agent who is compensated by wages from his employer cannot retain for himself commissions received from persons with whom he deals in the course of his employment, and his employer is entitled to deduct from his wages any such commission retained by the employe: *Kinney v. Mahoning Mills*, 13 Pa. Superior Ct. 573 (1900). So also, the employer may set off against his employe's wages the amount of loans advanced to the employe and the amount of bills owed to third persons by the employe and paid for him by the employer: *Shadoan v. Langdon*, 195 Ky. 495, 242 S. W. 841 (1922); *Princeton Coal Co. v. Dorth*, 191 Ind. 615, 133 N. E. 386 (1921) (rehearing denied, 191 Ind. 615, 134 N. E. 275 (1922)).*

* The Wage and Hour Division itself has recognized as the equivalent of the payment of wages the deduction, when authorized by the employe, of amounts paid or to be paid to the employe's insurance company for insurance premiums or to a store from which he has bought goods, provided the employer does not receive any profit or benefit from the transaction which would reduce the net amount received by the employe, in cash and in payment of his indebtedness combined, to an amount less than the minimum wage (Wage and Hour Division, General Counsel's Interpretative Bulletin No. 3, Esp. Pars. 12, 13, 14, 17, issued Oct. 21, 1938, and revised August and Octo-

It is of course but an elementary principle of common-sense justice to permit an employer to deduct from the debt, viz., wages, which he owes his employe any debt which the employe owes him, and to consider payment of the balance as a full discharge of the employer's obligation to pay the employe's wages; and that principle is recognized by the cases cited.

These cases involve no conflict whatever with the principle, frequently embodied in statutes, that an employer may not require an employe to accept his payment of wages in any other medium than money (see *Princeton Coal Co. v. Dorth*, 191 Ind. 615, 134 N. E. 275 (1922)). The latter principle, which, for example, is applied in the statutes forbidding the payment of wages in "truck" or "store-orders," is designed to prevent the employer, under the guise of paying "money's worth," from discharging his claim to the employe by something worth less than the amount of money which the employe is entitled to receive. However, if in fact the payment in a substitute for money is so safe-guarded as to insure its equivalence to the full money wage, the right of the employer to pay by means of such a substitute is generally recognized, and is in fact recognized by Section 3 (m) of the Fair Labor Standards Act (quoted above at p. 4), which defines wages so as to include the

ber, 1940) 2 C. C. H. Labor Law Service, Par. 32103; 52 Wage and Hour Reporter 570, 573. For example, the interpretative bulletin of the General Counsel of the Wage and Hour Division states:

"In such case payment to the third person for the benefit and credit of the employe will be considered equivalent, for purposes of the Act, to payment to the employe."

reasonable cost to the employer of furnishing the employe with "board, lodging, or other facilities," and thereby in effect permits such cost to be set off against wages. Even that provision, however, need not be invoked in the situation presented in the instant case, since what the employe here received was not a substitute for money but the money itself, which he collected on behalf of the employer.

The Accounting and Guarantee Plan, as explained in the foregoing sections of this brief, is nothing more nor less than an instance of the employer setting off against the wages due to the employe the amount of money collected by the employe as compensation in the course of his employment, which money the employe would ordinarily be required to pay over to his employer but which the employer allows him to keep as payment or part-payment of his wages. This is payment by the employer in as real and direct a sense as when another type of debtor is permitted to discharge his obligation to his creditor by setting off what the creditor owes him.

This is clearly recognized by the Circuit Court of Appeals in the instant case, as appears from the following language of its opinion (118 F. (2d), at p. 327):

"The Act undoubtedly contemplates that the employee shall be paid his wages by the employer out of the employer's funds. But it does not prohibit the employee being given the duty of collecting the employer's money, and the privilege of paying himself out of it, subject to ac-

counting, provided the employer stands ready to promptly pay any balance due the employee. For example, an interstate trolley company might authorize its conductor to collect cash fares, and account for them thus. The fares would belong to the employer, but the conductor might take and spend them to the extent of his wages, because the employer had authorized it. Otherwise he could not. We perceive no breach of the minimum wage provisions of the law in such an accounting arrangement fairly and promptly carried out. * * * *We do not think the Act condemns ipso facto all payment of wages by accounting, or requires us to say that although the employee got all he ought to have had of his employer's money, the employer must pay again because the employee was allowed to keep what was in his possession instead of paying it to the employer and receiving it back again.* (R. 219-220). (Emphasis supplied)

The point was also well stated by Judge Waller in his opinion in the District Court in the instant case. After pointing out that "wages" as defined in the Act includes the "reasonable cost" of furnishing "board, lodging, or other facilities," Judge Waller stated (35 F. Supp., at p. 270):

"The reasonable cost of board, lodging, and the like, may be determined by the Administrator; that is to say, that the Administrator has the right, probably the duty, to determine whether or not the cost of the things charged to the employee as wages is reasonable. *The Act does not*

prohibit the compensation of a wage earner with something other than money paid out of the pocket of an employer, but whatever is charged as a wage must be reasonable. If, however, the 'other facilities' happen to be money, there is no 'reasonable cost' to be determined by the Administrator. For example, if Jones pays his truck driver 15 cents an hour and permits him to use his truck to haul for other people, whereby the truck driver makes an additional 15 cents an hour, there would be nothing for the Administrator to determine as to the reasonable cost of their arrangement. The main point is, does the truck driver receive the wages required by the Act, and if he received a portion from Jones as fixed wages and the balance from instrumentalities furnished by Jones, under circumstances that the matter of reasonable cost was not involved, it would seem there was nothing for the Administrator to determine. *It would also seem that the letter of the Act itself contemplates the use of facilities in the matter of payment of wages.* * * * (R. 199-200).

"However, if we concede that they were employees and within the Act, we would still find that, in cash paid directly and through the facilities furnished by the employer, plaintiffs have been paid, in the aggregate, considerably in excess of the minimum wages required by said Act. *It would seem immaterial whether the employee was paid by the employer directly or whether he was paid through an instrumentality or facility set up for his use and benefit by the employer.*" (R. 201). (Emphasis supplied)

And again (p. 271):

"The Court believes that the wording of the Act in defining 'wages' provides that things other than the direct payment of money can be used in the payment of wages. *The plaintiffs here were paid in money, but in an indirect way—through facilities afforded the plaintiffs by defendant: * * *. They were compensated in money which the defendant had the legal right to collect and to keep if it rendered the services through its employees as contended. There can be no substantial difference between compensation for services rendered and wages for services rendered.*" (R. 202). (Emphasis supplied)

Defendant submits that the arguments advanced in previous sections of this brief amply demonstrate that the amounts received by red caps from the defendant's patrons, for services performed by the red caps as defendant's employees and in the course of their employment, were sums which the defendant from the time that the employer-employee relationship originated had the legal right to require the red caps to turn over or account for to it. It asserted that right by the notice of October 24, 1938, which the plaintiffs accepted by continuing to work thereunder and by accepting the benefits of the guarantee proffered by the notice. Thereafter it was not open to question that: (1) the sums received by the red caps from defendant's patrons, as so-called "tips" were sums which the defendant claimed and the red caps recognized as due from them to the defendant, and

(2) the defendant permitted the red caps to retain such sums as their own property in payment *pro tanto* of the red caps' claim against the defendant for wages. Such permission to the red caps to retain, as their own, sums which belonged to the defendant constituted payment by the defendant in the ordinary legal sense of the term and was, therefore, payment within the meaning of the statutory obligation to "pay," imposed by Section 6 (a) of the Fair Labor Standards Act.

2. IT WAS THE INTENT AND POLICY OF THE CONGRESS, IN ENACTING THE MINIMUM WAGE PROVISIONS OF THE FAIR LABOR STANDARDS ACT, TO REQUIRE THE EMPLOYER TO PROVIDE THE EMPLOYEE WITH MEANS SUFFICIENT TO DEFRAY THE COST OF A MINIMUM STANDARD OF DECENT LIVING; AND THE MINIMUM WAGE PROVISIONS OF THE ACT SHOULD BE CONSTRUED ACCORDING TO THAT INTENT, IN PREFERENCE TO A CONSTRUCTION WHICH WOULD DISREGARD THE INTENT OF THE CONGRESS AND WOULD REQUIRE THE EMPLOYER TO PAY THE EMPLOYEE AT A SUBSTANTIALLY HIGHER RATE THAN THAT FIXED BY THE ACT.

It is thus clear, from the considerations discussed in the immediately preceding section, that there is nothing in the language of the minimum wage provisions of the Fair Labor Standards Act which prohibits the payment of wages by the employer, as required therein, in a manner such as that provided in the Accounting and Guarantee Plan. But it is not enough in a statute of this kind to look only at its words. Consideration of the intent and policy of

the Congress in enacting the statute shows even more clearly that the method of payment provided by the Accounting and Guarantee Plan constituted full compliance with the requirements of the Act.

It is of course axiomatic that a proper and reasonable construction of a statute requires that the statutory language shall be read in the light of the intent and purpose of the Congress in enacting the statute. This principle has been stated by this Court in a classic passage of its opinion in *Hawaii v. Mankichi*, 190 U. S. 197 (1903), at page 212, in the following language:

But there is another question underlying this and all other rules for the interpretation of statutes, and that is, what was the intention of the legislative body? Without going back to the famous case of the drawing of blood in the streets of Bologna, the books are full of authorities to the effect that the intention of the law-making power will prevail, even against the letter of the statute, or, as tersely expressed by Mr. Justice Swayne in *Smythe v. Fiske*, 23 Wall. 374, 380: 'A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law.' A parallel expression is found in the opinion of Mr. Chief Justice Thompson of the Supreme Court of the State of New York, (subsequently Mr. Justice Thompson of this court), in *People v. Utica Ins. Co.*, 15 John. 358, 381: 'A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the

*letter; and a thing which is within the letter of the statute, is not within the statute, unless it be within the intention of the makers.**

“Without going farther, numerous illustrations of this maxim are found in the reports of our own court. Nowhere is the doctrine more broadly stated than in *United States v. Kirby*, 7 Wall. 482, in which an act of Congress, providing for the punishing of any person who ‘shall knowingly and wilfully obstruct or retard the passage of the mail, or any driver or carrier,’ was held not to apply to a state officer who had a warrant of arrest against a carrier for murder, the court observing that no officer of the United States was placed by his position above responsibility to the legal tribunals of the country, and to the ordinary processes for his arrest and detention when accused of felony. ‘All laws,’ said the court, ‘should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter.’ A case was cited from Plowden, holding that a statute, which punished a prisoner as a felon who broke prison, did not extend to a prisoner who broke out when the prison was on fire, ‘for he is not to be hanged because he would not stay to be burned.’ Similar language to that in *Kirby’s* case was used in *Carlisle v. United States*, 16 Wall. 147, 153.”

* Emphasis supplied. This point was urged upon the Supreme Court of New York in *People v. Utica Ins. Co.*, by Mr. Martin Van Buren, who was at that time Attorney General of the State of New York.

The principle was again well stated by this Court, through Mr. Justice Reed, in the recent case of *United States v. American Trucking Ass'ys*, 310 U. S. 534, 542-43, 60 S. Ct. 1059, 1063-64 (1940), as follows:

"In the interpretation of statutes, the function of the courts is easily stated. *It is to construe the language so as to give effect to the intent of Congress.* There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute; particularly in a law drawn to meet many needs of a major occupation.

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. *When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act.* Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." (Emphasis supplied)

To the same effect are *Ozawa v. United States*, 260 U. S. 178, 43 S. Ct. 65 (1922), and *United States v. Stone & Downer Co.*, 274 U. S. 225, 47 S. Ct. 616 (1927).

It follows from the principles thus established by these and many other decisions that the intent and policy of the statute must be considered in order to arrive at its proper interpretation. What was the intent and policy of the Congress in enacting the minimum wage provisions of the Fair Labor Standards Act?

(a) *The history of minimum wage legislation shows that the purpose of such legislation has always been to insure to the employe the means sufficient to provide a minimum standard of decent living.*

Extensive demonstration is not needed to show that the purpose of minimum wage legislation has always been to insure to workers the means sufficient to enable them to defray the cost of a minimum standard of decent living. No more persuasive reference in support of that proposition can be made than to the brief prepared by Mr. Justice Frankfurter, when at the bar, and filed with this court in *Adkins v. Children's Hospital*, 261 U. S. 525, 43 S. Ct. 394 (1922). The arguments therein presented in support of the District of Columbia Minimum Wage Law, and the material with respect to the whole minimum wage movement and minimum wage legislation in the various states of this country and in other countries, which is collected and analyzed in that brief, indicate very clearly that the securing of a minimum standard of decent living has been the objective of all such legislation.

Thus, it is said in that brief, at page xxviii, in discussing the background of the District of Columbia Minimum Wage Law:

“It thus appears that Congress, in its responsibility for the District, was confronted with the evils flowing from a deficit between the minimum cost necessary for women workers to live without detriment ‘to their health and morals,’ and the wages which were actually being paid *below this minimum* to a considerable percentage of ~~the~~ of the women workers of the District.”

The brief then quotes a portion of the testimony of Dr. Woodward, Health Commissioner of the District, which includes the following language (pp. xxviii-xxix):

“It stands to reason, therefore, that inadequacy of wage means either of two things: On the one hand it may mean inadequacy of shelter, inadequacy of clothing, inadequacy of food, inadequacy of recreational facilities on the one hand it may mean any one of those conditions, or it may mean all—with resultant impoverishment of health—or, on the other hand, it means that from some source or other the wage must be supplemented, with possible resort to wrongdoing to accomplish that end.”

The brief goes on to state, at page xxx:

“There is no dispute that Congress was honest, was acting in good faith, after mature deliberation, in avowing the purposes which it did in the enactment of the Minimum Wage Law, to wit:

"to protect the women and minors of the District from conditions detrimental to their health and morals, resulting from wages which are inadequate to maintain decent standards of living."

"In a word, the ends towards which this legislation was directed were; within the area of Congressional power, the ends of the very life of the Nation, namely the health and civilized maintenance of this generation, and a healthy and civilized continuance of generations to follow."

In opening its discussion of minimum wage legislation generally, that brief states as follows, on page 1:

"Minimum wage legislation has raised the wages of the workers at the bottom of the wage scale. The level attained varies from state to state according to the determination of each wage board or commission upon the facts and after hearing as to *the necessary cost of living sufficient to maintain the worker in health.*"
(Emphasis supplied)

And, in discussing the need for minimum wage legislation for women in particular, the brief points out, at p. 687, that:

"In certain industries and occupations the level of wages is below the cost of living."

"Recent authoritative statistics show that in certain industries, the average wage is too low to maintain the workers in health judged even by the most meagre standard."

And again, at p. 915, under the heading, "The Minimum Standard of Living."

"The conception of a 'living wage' is growing from indefiniteness to a scientific standard that can be defined and measured as to the cost of maintenance of a healthy worker."

Nothing in any of the arguments or material set forth in that brief, and nothing in the history of minimum wage legislation generally, indicates that the purpose of such legislation has ever been other than to insure a minimum standard of decent living for workers.

(b) The legislative history of the Fair Labor Standards Act, and the face of the Act itself, show that its only purpose was to insure to workers the means sufficient to meet the cost of a minimum standard of decent living, and not to impose additional burdens on the employer.

Examination of the legislative history* of the Fair Labor Standards Act reveals beyond question that the evil which the Act was designed to eliminate was the existence of wages too low to provide a decent standard of living, and that the purpose of the Act and the intent of the Congress in enacting it was, as declared in the Act itself, to secure to workers the means of obtaining such a standard of living. Nothing in its legislative history, any more than in the Act itself, indicates that it was in any way designed

* For the complete legislative history of the Act, see Douglas and Hackman, "The Fair Labor Standards Act," 53 Pol. Sci. Q. 491.

for the purpose of imposing additional burdens upon employers, requiring the payment of compensation from an employer to his employe in any particular form or manner, or regulating wages or terms of employment generally, except insofar as such regulation was necessary to insure that the employer would provide the employe with what Congress regarded as the cost of a minimum standard of living.

The Fair Labor Standards Act was the legislative culmination of recommendations contained in President Roosevelt's message to Congress of May 24, 1937, in which the President, among other things, referred to the plight of the "ill-nourished, ill-housed and ill-clad" third of our population. Shortly thereafter, Senator (now Mr. Justice) Black, and Representative Connery, simultaneously introduced bills in the Senate and in the House of Representatives which were designed to attain the objectives outlined by the President. Joint public hearings were held before the Senate Committee on Education and Labor, of which Senator Black was Chairman, and the House Committee on Labor, of which Representative Connery was Chairman. The latter died not long afterwards, and was succeeded as Chairman of that Committee by Representative Norton.

On July 6, 1937, Senator Black reported to the Senate for his Committee, favoring passage of the proposed bill with certain amendments, and on August 2 it was passed by the Senate with further amendments. Excerpts from the report thus presented to the Senate (Senate Report No. 884, 75th Congress,

First Session) indicate clearly the purpose of the bill and the intent of the Senate in passing it:

"The Committee believes that a start should be made at the present session of the Congress *to protect this Nation from the evils and dangers resulting from wages too low to buy the bare necessities of life* * * * and from too long hours of work injurious to health. * * *"
(Emphasis supplied) (Page 4, S. R. 884).

"Section 4 (b) authorizes the Board by order to declare from time to time for such occupations as are brought within the operation of the act minimum wages which shall be as nearly adequate as is economically feasible without curtailing opportunity for employment to *maintain a minimum standing of living necessary for health, efficiency, and general well-being.*" (Emphasis supplied) (Page 6, S. R. 384).

Thereafter on July 27, 1937, Senator Black made the following statement on the floor of the Senate during debate on the bill (81 Congressional Record 7651, 1937):

"The bill is intended to prevent, so far as wages are concerned, the payment of *wages which are below a necessary subsistence level.* The bill is written upon the principle that the Congress should not attempt to make itself a wage-fixing body. We believe that wages should be fixed by agreement between employer and employee except that the bill has as its objective withdrawing from competitive conditions the wage level necessary for a person to live on wherever he may be."
(Emphasis supplied)

This bill (S. 2475) was then referred to the House Committee on Labor, which amended it in certain minor respects, and Representative Norton, for the Committee, in reporting it favorably to the House on August 6, 1937 (House Report No. 1452, 75th Congress, First Session), indicated that the House Committee had exactly the same purpose in mind in recommending the bill as did the Senate Committee:

"A full third of the American people have not the purchasing power to maintain what we should like to regard as *a decent standard of American life*. Too many of our workers are working excessively long hours for excessively low pay." (Emphasis supplied) (Page 8, H. R. 1452).

"The Board is permitted to determine minimum wages and maximum hours *only in those industries where sub-standard labor conditions exist*." (Emphasis supplied) (Page 10, H. R. 1452).

The bill as thus recommended to the House provided for a Labor Standards Board, with power to fix minimum wages and limit maximum hours for industries covered by the bill, in accordance with the purpose of the Act. The bill in this form did not pass the House, but was resubmitted to the House Committee for further consideration. That Committee reported again on April 28, 1938 (House Report No. 2182, 75th Congress, Third Session), recommending passage of a revised bill, wherein the proposed Labor Standards Board was eliminated and instead a provision was made for a flat 25¢-an-hour

rate for the first year, to be increased 5¢ an hour per year until 40¢ an hour was reached. These flat minimum wage amounts reflected the Committee's own conception of the amount necessary to meet the cost of a minimum standard of decent living. That the purpose of the Act was to insure such a standard of living for workers was again manifested by the comments in the House Committee's new report:

*"The Federal government cannot and should not attempt to regulate the wages of all wage earners throughout the United States. But the Federal government cannot by its inaction permit the channels of commerce to be used to set this spiral of deflation in motion. * * * It cannot in silence see the channels of commerce used to spread suffering and destitution. * * * Unless the wages paid by private employers are sufficient to maintain the bare cost of living, such demands [for relief] will necessarily continue. * * * It [the Committee amendment] establishes a floor for wages, and a ceiling for hours, and abolishes child labor."* (Emphasis supplied).

(Page 6, H. R. 2182.)

Thereafter, the House and Senate Committees in joint conference considered the bill, as thus amended by the House Committee and passed by the House, and, after further minor amendments, made a report to the Congress recommending that the bill be passed in the form in which it was passed on June 25, 1938. That final report (House Report No. 2738, 75th Congress, Third Session) reiterated the policy of the Act, which, it stated, was to correct and eliminate:

"labor conditions detrimental to the *maintenance of the minimum standard of living necessary for health, efficiency and general well-being.*" (Emphasis supplied)

(Page 28, H. R. 2738.)

In the face of this legislative history, there can be no doubt that the purpose which was uniformly in the minds of both Houses of Congress and their Committees in considering and enacting the Fair Labor Standards Act was to insure for workers a minimum standard of decent living.*

Finally, the best evidence of the purpose of the Fair Labor Standards Act and the intent of Congress in enacting it is to be found on the face of the Act itself. The "policy" section (Sec. 2) provides as follows:

"(a). The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the *minimum standard of living necessary for health, efficiency, and general well-being of workers* (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and

*The propriety of referring to legislative matter of the character discussed above in order to determine the purpose of a statute is of course well established: *United States v. City and County of San Francisco*, 310 U. S. 16, 60 S. Ct. 749 (1940); *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 60 S. Ct. 982 (1940).

obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

“(b) *It is hereby declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to, in such industries without substantially curtailing employment or earning power.*” (Emphasis supplied)

No better discussion of the purpose of the Act and the intent of the Congress in enacting it can be found than that which appears in a note entitled “Fair Labor Standards Act—Tips as Wages,” commenting on the *Pickett* case, in 40 *Columbia Law Review* 1262 (November, 1940), as follows (pp. 1262-64):

“The general purpose of the legislation is, however, clearly indicated in many ways. Throughout the hearings, reports, and debates there are repeated references to ‘industrial workers’ in saw mills, sweatshops and factories who are receiving approximately \$4 to \$10 a week, *who cannot buy the ‘bare necessities of life,’ who are working under ‘substandard labor conditions,’ and whose wages are below the ‘necessary subsistence level.’* The original Senate and House bills as reported to the first session of the 75th Congress in 1937 did not provide for a definite twenty-five cent or thirty cent minimum hourly wage, but left to the discretion of a Labor Standards Board the task of declaring for each occupation a minimum wage which would be as nearly adequate as was economically feasible and which would maintain a ‘mini-

minimum standard of living necessary for health, efficiency and general well-being.' Evidently the primary aim of the legislators was to see that the reward for labor would at least be sufficient to provide a decent living. * * *

"Hence it may be contended with some justification that the Act was designed not to insure the minimum wage in addition to other income received for the same work, but to insure a minimum standard of living to the employee. The declaration of policy in the statute itself would seem to bear out this thought. It is also worthy of note that there was no administrative practice established under the Act which could have impelled the court toward the contrary position."

(Emphasis supplied)

(c) Construction of the minimum wage provisions of the Fair Labor Standards Act in accordance with its purpose makes it clear that payment to the plaintiffs under the Accounting and Guarantee Plan was in compliance with the Act; and such a construction is to be preferred to the plaintiffs' construction, which would disregard the purpose of the Act and would result in the payment of more than the minimum wage required by the Act.

Is the Accounting and Guarantee Plan in accordance with the purpose and intent of the Fair Labor Standards Act, as thus made plain by the legislative history of the Act and by the face of the Act itself? It seems obvious that the answer must be in the affirmative, since under that plan the employee was certain to receive, in money, at least the full amount which

the Congress fixed in the Act as the amount needed to meet the cost of a minimum standard of decent living. The only possible question is whether the compensation received by the red caps under the Accounting and Guarantee Plan constituted payment by the employer to the employe, within the meaning of the literal terms of the Act.

It has already been pointed out above (pp. 100-108) that the method of payment provided by the Accounting and Guarantee Plan constituted legally a payment by the employer to the employe. There is nothing in the Act which prohibits an employer from paying his employe in part or in whole by permitting the employe to retain money collected in the employer's behalf; indeed, there is nothing in the Act which requires or prohibits payment by the employer in any particular manner or by any specified method, and the contention that the method provided by the Accounting and Guarantee Plan is not a literal compliance with the Act is therefore wholly without foundation. But even if it were established that the method of payment provided by this Plan did not literally comply with the letter of the Act, the Plan would, since it fulfills the purpose of the Act, fall squarely within the proposition so well stated by Mr. Justice Thompson in *People v. Ufica Ins. Co.*, *supra*, and adopted by this court in *Hawaii v. Mankichi*, *supra*:

"A thing which is within the intention of the makers of a statute is as much within the statute

as if it were within the letter" (190 U. S. at p. 212).

Surely, it would be a monstrous thing to impose as drastic a penalty as that provided in this Act (in the form of double the wages due plus costs and attorney's fees) for conduct which amounts to a full compliance with the purpose and intent of the Act. It is unthinkable that the Congress would have provided a severe penalty of this character unless it had been aimed at violations which would tend to thwart the purpose and intent of the Act. The existence of the penalty provision is consistent only with the supposition that it was the intent of Congress to accomplish the ultimate objective of the Act, not to require that this ultimate objective be achieved by some particular limited means determined by a narrow and technical construction of the letter of the Act.

In contrast to the construction of the Act urged by the defendant, which would give full effect to the intent and purpose of the Congress and would recognize the Accounting and Guarantee Plan as a lawful compliance with the Act, the construction urged by the plaintiffs would in effect disregard the purpose of the Act, since it would result in requiring the payment to the employe of large sums in excess of the amount deliberately fixed by the Congress in the Act as that which in its opinion is necessary to defray the cost of a minimum standard of living. The amount as thus fixed by the Congress for the period

covered by this action was 25 cents per hour during the first twelve months and 30 cents per hour during the final nine months, or a weighted average of 27 cents per hour for the whole period. As already pointed out, if the plaintiffs' construction of the Act is sound, the result would be that during the first twelve months covered by this suit they would have received, at the expense of their employer, compensation at the rate of 46.6 cents per hour, and, during the last nine months of the period, compensation at the rate of 51.6 cents per hour—nearly twice as much as the amount which Congress regarded as necessary to fulfill the purpose of the Act (see pp. 20-21 above). If, in addition, the amounts which plaintiffs seek to recover in this case are taken into account, it appears that the construction of the Act for which they contend would have the result of giving them nearly three times the compensation fixed as the minimum wage in the Act—even though there has been no intent on defendant's part to make the plaintiffs work for less compensation than the amount provided in the Act.

Thus, according to their interpretation, although the plaintiffs have already received \$35,293.12,—the amount reported by them as the compensation paid by defendant's patrons for services performed by the plaintiffs as defendant's employees,—and, in addition, the amounts received directly by plaintiffs from defendant, viz., \$8,321.33,—which two figures, together totaling \$43,614.45, amount to \$3,019.76 more than

the amount of the minimum wage prescribed by Section 6(a) of the Act (R. 13),—nevertheless, the plaintiffs would be entitled to recover again, as if for an unpaid minimum wage, \$32,273.36. In addition, it must be borne in mind that under Section 16 (b) of the Fair Labor Standards Act, if the plaintiffs are permitted to recover this \$32,273.36, they are at the same time entitled to recover “an additional equal amount as liquidated damages,” or, in other words, another \$32,273.36. This means that, if they are entitled to recover, plaintiffs will have received in all \$108,161.17,—nearly three times the amount of the minimum wage provided by the Act, which was \$40,594.69.

If the literal meaning of the Act is such as to produce that result, then it seems clear that the result is an “absurd or futile” one, within the principle stated in *United States v. American Trucking Ass'ns*, *supra*, (see p. 111 above), and that it should, therefore, impel the court to “look beyond the words to the purpose of the Act.” And if the Act is interpreted according to its purpose, then it is plain that the plaintiffs’ construction must be rejected; for their construction would effectuate, not the purpose of insuring the means of providing a minimum standard of living, so clearly indicated by the Act itself and its legislative history, but rather a purpose to burden the employer with an obligation to pay out large sums of money for the benefit of the employees. As stated in the note in 40 *Columbia Law Review* 1262,

in commenting on the fact that the Administrator of the Wage and Hour Division had expressed an opinion that tips are not wages, but had "left the solution of the problem to the courts" and had made no ruling on the question (p. 1264):

"In any event, it is rather difficult to agree with his theory that the statute was intended to saddle a debt on the employer rather than to guarantee a decent living to the employee."

The unfairness and incongruity which would result from the plaintiff's construction of the Act was well recognized and forcefully pointed out by Judge Waller in his opinion below (35 E. Supp., at p. 271):

*"The intent of an Act is the essence thereof, and the intent thereof should be given effect as against the mere words of an act when the mere words, construed alone, would produce legislative or judicial brigandage. * * **

"Congress intended to secure to employees at least a minimum compensation for the hours of service performed. *It never intended that Section 6 of the Act should do more than that.* In the present case the plaintiffs, as a group, received out of their relationship, or employment, some \$3,000 in excess of the minimum wages required by law. They here seek to be paid again all sums which they have received out of their relationship or employment, plus an equal amount as liquidated damages, plus attorney's fee. *I subscribe wholeheartedly to the real purpose of the Act as I conceive it, but I cannot ascribe to Congress the superlative folly of intending that an employee, under the circumstances of this case,*

wherein no element of willfulness is involved, should recover the minimum wage thrice multiplied." (Emphasis supplied)

3. THE FACT THAT DEFENDANT'S CONSTRUCTION OF THE FAIR LABOR STANDARDS ACT IS IN ACCORD WITH THE PURPOSE OF THAT ACT IS CONFIRMED BY THE CONSTRUCTION GIVEN TO OTHER SOCIAL LEGISLATION, WHEREBY TIPS HAVE BEEN REGARDED AS EQUIVALENT TO WAGES PAID TO THE EMPLOYE BY THE EMPLOYER.

The Fair Labor Standards Act is but one of a series of so-called "social legislation" statutes which have been enacted in recent years both by Congress and by State legislatures, and which have the same general objective of assuring the existence of certain conditions among those employed in industry. In numerous instances, other statutes in this series have been construed by courts and administrative bodies in such a manner that tips are treated as the equivalent of the salary or wages which the statute contemplates as being paid by the employer to the employee. Construction of those statutes in such manner provides persuasive confirmation of the construction of the Fair Labor Standards Act for which the defendant here contends, viz., that the application of tips on the wages due the employee, as provided in the Accounting and Guarantee Plan, is fully in accord with the purpose and intent of the Act and is therefore in compliance with the Act.

(a) *Workmen's Compensation Acts.*

The object of Workmen's Compensation statutes is to assure an income to employees when they are in-

jured in accidents arising out of and in the course of their employment. The incomes thus to be assured to the employes are based on certain percentages of the wages or salaries formerly paid to the employes for the work in which they were engaged.

Thus, in *Sloat v. Rochester Taxicab Co.*, *supra*, the court decided that tips should be considered in determining the basis on which the compensation payments made to an injured employe should be calculated under the New York Workmen's Compensation Law. In this regard, the pertinent part of the New York statute provided that the amount of the compensation should be based on (163 N. Y. Supp. at p. 905):

"the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer."
(Emphasis supplied)

The court pointed out (pp. 905-6 of 163 N. Y. Supp.) that the "*employe could not have received the tips if the employer had not put him in the way of getting them,*" and so concluded that tips were an advantage received from the employer.* To the same

*It is true that the New York statute contained the word "advantage," a word not used in the Fair Labor Standards Act. However, this is of no significance, in the face of the court's holding that tips constituted compensation "received from the employer." The court there was concerned, not with construing the word "wages," which did not appear in the controlling section of the New York statute, but with the question whether tips were compensation "received from the employer," and should therefore be included in the basis for calculating the payments provided by the statute. The court's holding on this point is an exact precedent for the defendant's contention herein that the tips received by the red caps under the Accounting and Guarantee Plan were "received from the employer" and therefore paid to them by the employer.

effect are the decisions under the same statute in *Bryant v. Pullman Co.*, *supra*, and in *Kadison v. Gottlieb*, 226 App. Div. 700, 233 N. Y. Supp. 485, (1929).*

Another case which clearly supports the defendant's construction in this respect is *Powers' Case*, 275 Mass. 515, 176 N. E. 621 (1931), a case under the Massachusetts Compensation Act, which made "wages" the basis of compensation. There the employe, a waitress in a restaurant, received from her employer a fixed stipend and was also allowed to retain for herself tips given her by the patrons of the restaurant. In holding that these tips were the equivalent of wages under the Act, the court said (176 N. E., at p. 622):

*"It seems plain that from the standpoint of the employee the tips in the case at bar were in the nature of wages or earnings. * * * The stipend paid to her by the employer was the smaller part of the actual income received by her as a consequence of her labor for him. The situation was fully understood and freely assented to by the employer. * * * The tips were in the nature of part payment for the service received by the patrons at the place of business of the employer. Payments made to his employee by his patrons with the approval of the employer, under the protection of his place of business and for his benefit,*

* Both the *Bryant* and the *Sloat* cases were cited by the Brotherhood of Red Caps in its brief filed with the Interstate Commerce Commission in the *Ex Parte* 72 proceedings, in support of the position at that time taken by the red caps that tips were wages. In that case, the red caps quoted liberally from the *Sloat* case in arguing that they were employes of the carriers because they received wages from them when they were permitted by the carriers to retain tips. Having achieved the desired result in that case, they now reverse their position and reject the argument on which they therein relied.

bear a close analogy to wages paid by him."
(Emphasis supplied)

A like situation existed in *Gross' Case*, 132 Me. 59, 166 Atl. 55 (1933). The Maine Compensation Act provided for calculation of the compensation on the basis of "wages, earnings or salary," and further provided that, "in determining the compensation to be paid, benefits received from any other source than the employer shall not be taken into consideration." The Maine Court "adopted * * * with full approval" the decision of the Massachusetts court in *Powers' Case*, *supra*, and held that tips received by the waitress from patrons of the restaurant did not constitute "benefits received from any other source than the employer," and were therefore properly included in the "wages, earnings or salary" on which the compensation was based. In fact, the court expressly treated the employee's tips as wages in stating that "patrons help him (the employer) pay the wages which is fairly due from him to his employee."

Further support for the defendant's position is found in the Texas courts, which have decided that, under the Texas Workmen's Compensation Act, which defines wages as remuneration "which the employee receives from the employer," tips are included therein: *Lloyd's Casualty Co. v. Meredith*, 63 S. W. (2d) 1051 (Tex. Civ. App., 1933); *Federal Underwriters' Exchange v. Husted*, 94 S. W. (2d) 540 (Tex. Civ. App., 1936).*

*The Texas statute provided that compensation should be based on wages and "other advantages received by the injured employee as part of his remuneration and which can be estimated in money." However, the Texas courts held tips to be "wages" under the statute and not "advantages," which is of course reasonable, since tips are in themselves money and not something which needs to be "estimated in money."

(b) *Federal Social Security Act.*

The Federal Social Security Act provides for the assessment of taxes on the basis of "wages" paid or payable to the employe by the employer. Thus, Section 1004 of Title VIII of the Act (42 U. S. C. 1004) provides:

"In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the *wages* (as defined in Section 1011 of this chapter) *paid by him* after December 31, 1936, with respect to employment (as defined in Section 1011 of this chapter) after such dates."
(Emphasis supplied)

Section 1101 of Title IX of the Act provides (42 U. S. C. 1101):

"On and after January 1, 1936, every employer (as defined in Section 1107 of this chapter) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in Section 1107 of this chapter) *payable by him* (regardless of the time of payment) with respect to employment (as defined in Section 1107 of this chapter) during such calendar year."
(Emphasis supplied)

It is clear from these provisions that the tax which the employer must pay is based on the wages which are paid or payable by him to his employe. Wages under the Act are defined as follows. (42 U. S. C. 1011):

"The term 'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash."

In construing these provisions of the Security Act, the Bureau of Internal Revenue of the Treasury Department has determined that tips reported to the employer for the purpose of enabling the employer to compute the sum due to the employee, under a plan providing for guaranteed income to the employee, constitute wages paid by the employer or wages payable by the employer, within the meaning of the Act. This ruling was set forth in *Internal Revenue Bulletin*, C. B. 1938-1, p. 456, in which the following language appears:

"Question 4. If a hotel or restaurant guarantees its waiters a fixed income consisting partly of remuneration paid by the restaurant and partly of tips, does such a guarantee affect the status of the tips received by the waiters?"

"Answer. Inasmuch as the employer bases the remuneration of his employee on the amount of such tips, and since the employees must inform the employer of the amount of tips received in order that the latter may compute the balance due the employees, it is clear that such tips constitute 'wages' within the meaning of Titles VIII and IX of the Act."

In this ruling, the Treasury Department thus treated tips as wages "paid" or "payable" by the

* Summarized in I. C. C. H. Unemployment Insurance Service, Pars. Fed. 5204.271 (p. 2624), and 5704.015 (p. 2429).

employer, within the meaning of the Social Security Act. The facts presented in that ruling were exactly parallel to those involved in the case at bar, and the same answer should be given here as was given there.

(c) *National Labor Relations Act.*

The National Labor Relations Board, in ordering the reinstatement of waiters discharged for union activity, has directed in proceedings under the National Labor Relations Act that the "back pay" which must be paid by the employer should be calculated on the basis of previous average income, including tips: In re *Club Troika*, 2 N. L. R. B. 90 (1936); In re *Willard*, 2 N. L. R. B. 1094 (1937). The clear implication from these decisions is that tips were "pay" to the employe from the employer, and should therefore be included in the "back pay" which the employer must make up to the employe.

(d) *Railroad Retirement Act.*

A specific administrative ruling with respect to the Accounting and Guarantee Plan itself has been rendered by the Railroad Retirement Board, regarding compensation to be credited to red caps for purposes of the Railroad Retirement and Railroad Unemployment Insurance Acts (45 U. S. C., Secs. 228a and 351). Although the term "compensation" is defined in the Railroad Retirement Act so as expressly to exclude tips (45 U. S. C., Sec. 228a (h)), the Retirement Board has nevertheless decided that under the Accounting and Guarantee Plan the "tips" or other

remuneration collected by red caps from railroad patrons are to be included, along with the amounts paid them directly by the railroads, as the red caps' compensation under those statutory provisions. The conclusion of the General Counsel of the Board (which became the Board's ruling) was as follows (Opinion No. 1941, R. R. 35 and U. I. 11, dated September 17, 1941):

"It is my opinion that 'red caps' under this arrangement can be credited with 'compensation' under the Railroad Retirement Act and the Railroad Unemployment Insurance Act in an amount (but not including any amount in excess of \$300 in any one month) equal to the amounts of tips, or other remuneration received by them from railroad patrons which they are required to report to the railroads, plus whatever amount is necessary to make up the minimum guaranteed by the railroads. It is my further opinion that railroad 'employers' are liable for 'contributions' under the Railroad Unemployment Insurance Act under the arrangement on the same basis as compensation can be credited to their employees."*

It thus seems clear, from these decisions of the courts and of administrative bodies, that, in contending that the intent and purpose of the Congress in

* The Board's position in this respect has been summarized as follows (C. H. Railroad Unemployment Insurance Service, Par. 9265, pp. 7375-76):

"Although tips are specifically excluded by the Railroad Retirement Act from consideration as creditable compensation, the general counsel held that redcaps earn remuneration in a form which is different from pure tips, which are excluded. Under special arrangement with the railroads, redcaps are guaranteed a minimum amount, and are permitted to retain all gratuities subject to their being reported and credited against the minimum amount.

"Whatever redcaps are paid, even though in small amounts from railroad patrons, is in return for services performed under the railroad's supervision, and therefore for services as a railroad employee."

providing for a minimum wage was not to forbid the accounting for tips received in the course of employment (when the minimum wage was guaranteed by the employer) but was only to guarantee to the employee the minimum compensation specified in the Act, the defendant is urging a view that has been generally accepted as in accord with the policy and purpose underlying social legislation of this character.

II.

THE PROVISIONS OF SECTION 2, SEVENTH, AND SECTION 6 OF THE RAILWAY LABOR ACT, AS AMENDED, DO NOT SUPPORT THE CONCLUSION THAT THE DEFENDANT, IN PAYING WAGES TO THE PLAINTIFFS UNDER THE ACCOUNTING AND GUARANTEE PLAN, FAILED TO COMPLY WITH THE FAIR LABOR STANDARDS ACT.

In the Circuit Court of Appeals below, the plaintiffs argued that they had "verbal working agreements" with the defendant,—by which they apparently referred to their individual contracts of employment,—and that the notice of October 24, 1938, constituted a unilateral change in such working agreements contrary to the provisions of Section 6 of the Railway Labor Act.

Thus in their brief in the Circuit Court of Appeals the plaintiffs said:

"It has been shown above that the plaintiffs had a working agreement. Verbal though it may have been, it certainly was the agreement under which they were working, and just as effective as if it had been in writing signed by all the parties involved. The rights of the plaintiffs under their working agreement could not be taken away from them in any such high-handed manner as attempted by the publishing of the notice." p. 21 of Appellants' Brief in Circuit Court of Appeals).

Then, after referring to Section 6 of the Railway Labor Act, the plaintiffs continued:

"Certainly under this Section if this notice was intended to change or set up a new working condition or agreement, the plaintiffs as employees of the defendant, had a perfect right to disregard the same as not in any way even attempting to comply with the terms and conditions of this Section * * * (ibid., p. 22).

Plaintiffs in this Court, however, have apparently abandoned the contention that in the absence of a collectively bargained agreement the defendant could not put the Accounting and Guarantee Plan into effect without complying with the provisions of Section 6 of the Railway Labor Act and securing the express consent of the red caps to the plan, apart from and in addition to such consent as was implied in their continuing to work under the plan after having received due notice thereof.

The plaintiffs, undoubtedly realizing that the pro-

visions of Section 6 of the Railway Labor Act do not apply to individual contracts of employment, have now attempted in their brief in this Court to give substance to their argument with respect to the Railway Labor Act by contending that there was actually a collectively bargained agreement in effect between the defendant and the plaintiffs on October 24, 1938, when they received notice of the Accounting and Guarantee Plan; that the notice of that date was a unilateral attempt by the defendant to change this alleged collectively bargained agreement; that the notice was therefore of no legal effect; and that, because of the nullity of the notice, the money collected by the red caps from defendant's patrons continued to be the absolute personal property of the red caps and consequently could not be applied by the defendant on their wages. (Petitioner's Brief, pp. 21-25).

This contention of the plaintiffs is legally unsound and is not supported by the record, because Section 2, seventh, and Section 6 of the Railway Labor Act have reference only to collectively bargained agreements and not to individual contracts of employment, and the record shows that there was no collectively bargained agreement in existence between the plaintiffs and the defendant on October 24, 1938, when notice of the Accounting and Guarantee Plan was received by the plaintiffs. Furthermore, even assuming that there was a collectively bargained agreement between the plaintiffs and defendant on October 24, 1938, the notice of that date did not effect any change in such agreement so as to constitute a viola-

tion of Section 2, seventh, or Section 6 of the Railway Labor Act.

These points are considered in turn below.

A. Section 2, Seventh, and Section 6 of the Railway Labor Act have Application only to Changes in an Existing Collectively Bargained Agreement.

Section 2, seventh, and Section 6 of the Railway Labor Act have no application to individual contracts of employment between a carrier and its individual employes. Section 2, seventh, of the Act reads as follows:

"Seventh. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of this Act."

Section 6 of the Act provides:

"Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be

altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

It is clear from the terms employed in these two sections of the Act that the "agreements" referred to can only be collectively bargained agreements made by a carrier with a "class or craft" of employees through a duly recognized or accredited bargaining "representative" who, under the provisions of the Act, is authorized to deal for the entire class or craft. Thus, Section 2, seventh, provides that rates of pay, rules or working conditions of the employees "as a class as embodied in agreements" may not be changed except as provided therein. The only manner in which the Railway Labor Act contemplates that a carrier shall negotiate or agree with its employees "as a class" is through a collective bargaining representative, selected in accordance with the provisions of the Act (*i. e.*, selected by a majority of any particular class or craft of employees—Section 2, fourth, of the Act). The language of Section 6 also indicates conclusively that it is intended to apply only to collectively bargained agreements, and not to individual contracts of employment. It provides that the carriers and "representatives of the employees" shall give notice of an intended change in agreements, and it provides that the time and place for the beginning of conferences with respect to the proposed changes be-

tween "representatives of the parties interested in such intended changes shall be agreed upon" within a specified period. Obviously, such provisions have no pertinence with reference to the "working agreement" between an employer and an individual employee. Here again, therefore, the Act is clearly concerned only with changes in such agreements as have been made between the carrier and "representatives of the employees"—i. e., collectively bargained agreements—such representatives being those selected by the majority of a class or craft of employees in accordance with the provisions of the Act.

That the agreements with which the Act is concerned are those resulting from collective bargaining, rather than individual contracts of employment, is made clear by the discussion of the policy and purposes of the Act contained in the opinion of this Court in *Virginian Railway Co. v. System Federation No. 40, et al.*, 300 U. S. 515, 57 S. Ct. 592 (1937), quoted above (p. 94), to the effect that the Act does not preclude individual contracts of employment.

Thus it cannot be denied that Section 2, seventh, and Section 6 of the Act are purely procedural requirements, applicable by their terms when, and only when, either of the parties to an existing collectively bargained agreement desires to make changes in that agreement affecting rates of pay, rules or working conditions. It has no application unless such a collectively bargained agreement exists. This is, in fact, now conceded by the plaintiffs (Petitioner's Brief, p. 24):

"The collective bargaining agreement of February 1, 1937, and the subsequent amendments thereto, is the *collective bargaining agreement which Section 156 [i. e. Section 6] of the Railway Labor Act prevented the Terminal Company from altering* and held status quo the right of the Red Caps to the tips and gratuities received from the passenger." (Emphasis supplied)

Having abandoned the argument which they previously made to the effect that the Railway Labor Act prohibited the carrier from making any change in rates of pay or working conditions of the red caps because of the existence of individual contracts of employment, and apparently conceding that the provisions of Section 2, seventh, and Section 6 of the Act apply only to collectively bargained agreements, the plaintiffs now argue that such an agreement was in fact in existence at the time when the defendant instituted the Accounting and Guarantee Plan on October 24, 1938. It therefore becomes necessary to determine from the record whether there was in existence at that time any collectively bargained agreement between the defendant and a collective bargaining agent or representative of the red caps selected in accordance with the provisions of the Railway Labor Act.

B. There Was no Collectively Bargained Agreement in Existence Between the Plaintiffs and the Defendant When the Plaintiffs Were Given Notice of the Accounting and Guarantee Plan on October 24, 1938.

The plaintiffs contend in their brief in this Court (Petitioner's Brief, pp. 14, 21-25) that there was in

existence on October 24, 1938, when they received notice of the Accounting and Guarantee Plan, a collectively bargained agreement between the defendant and the red caps. The plaintiffs attempt to support this conclusion by reference to the exchange of correspondence between the General Chairman of the Brotherhood of Railway Clerks and the General Manager of the defendant, which is included in the record. This correspondence, together with the statements of the General Chairman of the Brotherhood of Railway Clerks and the defendant's General Manager contained in depositions set forth in the record, has been analyzed and considered in detail in the Statement above (pp. 22-45).

The analysis of the record contained in that part of the Statement shows that the Accounting and Guarantee Plan was placed in effect by a notice delivered to the red caps on or before October 24, 1938. The agreement which the plaintiffs now contend covered red caps on that date was the agreement made in February, 1937, between the defendant and the Brotherhood of Railway Clerks, covering by its terms clerical, station and storehouse employees, and expressly excepting "individuals performing personal services not a part of the duties of the Company" (Def. Ex. A, R. 81, 166-189). At the time this agreement was made between the defendant and the Brotherhood of Railway Clerks, that organization did not represent and did not claim to represent red caps. It was not until November 3, 1938 (almost two years after the making of the agreement upon which the

plaintiffs rely). that the Brotherhood of Railway Clerks secured the right to represent red caps, including plaintiffs. This was admitted by Wooten, the General Chairman of the Clerks' organization, in his deposition (see Statement above, p. 27, and R. 71, 72 and 83).

On the basis of the authority of the Brotherhood of Railway Clerks to represent red caps, obtained on or about November 3, 1938, the defendant subsequently to that date entered into negotiations for the first time with the Brotherhood as the duly authorized collective bargaining agent of the red caps. These negotiations ultimately culminated in an agreement covering the working conditions of red caps. This agreement was not effective until June 16, 1939. It contained no provisions with respect to wages.

That there was no collectively bargained agreement in existence on October 24, 1938, between the red caps or any representative thereof and the defendant is clear from:

- (1) the terms of the Clerks' agreement of 1937;
- (2) the circumstances surrounding the negotiation and execution of that agreement;
- (3) the conduct of the defendant and the plaintiffs subsequent to the execution of that agreement;
- (4) admissions of the plaintiffs and their representatives that that agreement had no application to red caps; and
- (5) the terms of the agreement executed on June 16, 1939, which admittedly covered red caps.

As set forth above (pp. 24-35), the agreement of 1937 (Def. Ex. A, R. 81, 166-189) which became effective on February 1, 1937, expressly excepted from its application "individuals performing personal service not a part of the duties of the Company" (R. 167). It should be remembered that at that time (i. e., 1937) the red caps were not regarded by the carriers as employees, and the services they performed were not considered as coming within the duties of the railroads as common carriers. Thus, at the time that agreement was made, red cap service was considered by the carriers as "personal service not a part of the duties of the Company."

The fact that this exception in the agreement of 1937 was intended to apply to red caps is further demonstrated by the statement of the Director General of Railroads, reported in the decision of the Interstate Commerce Commission in *Ex Parte* 72, concerning the status of red caps, that "the service performed by 'Red Caps' is personal service not a part of the duties of the carrier" (p. 29 above).

Not only does the language of the agreement itself indicate that it did not apply to red caps, but also the circumstances surrounding the negotiation and execution of this agreement lead to the same conclusion. The Brotherhood of Railway Clerks, with which the agreement of 1937 was made, did not represent the red caps at that time, and in fact did not secure authority to represent them until almost two years later. When the significance of this fact is considered,

the conclusion becomes inescapable that that agreement did not apply to red caps. The Brotherhood of Railway Clerks had no more reason for attempting to include red caps in this agreement—a class or craft which they did not represent—than they had for attempting to include engineers or shop craft employes, or any of the other classes of employes employed by the defendant. This organization had no authority to speak for red caps; no red caps were members of the organization; and, as Wooten said in his deposition (above, p. 34; R. 80), his organization had no interest in acting for the red caps until such time as they could establish their status as employes of the Terminal Company. He deposed that he had been approached over a period of two years by the red caps, and had always told them that they would have to have their status as employes established before his organization would consider representing them for collective bargaining purposes. His exact language (which is set forth in full at page 34 above) is:

“The Red Caps employed by the Jacksonville Terminal Company had been negotiating with me for approximately two years to become organized and get an agreement or come within the scope of our agreement [viz., the Clerks’ agreement of 1937] * * * I notified these employees that it would be useless to become organized until the Commission had rendered their decision, but that as soon as that decision was rendered, if it was favorable, we would accept the employees into

the organization and make contracts and handle their wages and working conditions as provided by the amended Railway Labor Act."

In the same statement Wooten says that he did not learn of the Interstate Commerce Commission's holding that red caps were employees until October 24, 1938. By his own statement, his interest in the plaintiffs dated from October 24, 1938, and his right to represent them dated from November 3, 1938. Prior to that time, by his own statement, " * * * it would be useless * * *" for them to become organized for the purpose of collective bargaining. Thus Wooten, who negotiated the agreement of 1937 as the representative of the Brotherhood of Railway Clerks, admits that, at the time that agreement was entered into, the red caps were not organized for the purposes of collective bargaining, and that his organization did not represent them. The clear inference, therefore, must be that they were not intended to be covered by that agreement.

The conduct of the Terminal Company and the Brotherhood of Railway Clerks, as well as the conduct of the red caps from February 1, 1937, when the Clerks' agreement was executed, until the institution of the Accounting and Guarantee Plan on October 24, 1938, is enlightening. No claim was made by the Brotherhood that red caps were covered by the 1937 agreement until after the institution of the Accounting and Guarantee Plan. The record does not indicate that, prior to that time, any claims had

ever been made that red caps were covered by the agreement of 1937. Although that agreement contained provisions with respect to seniority rights, the record indicates that as late as December 7, 1938, the defendant did not accord any seniority rights to red caps, and in fact was "laying off" red caps having greater seniority in favor of younger men with less seniority. This is revealed by a letter from Wooten to Wilkes, the General Manager of the defendant (Pl. Ex. 5, R. 52, 100-101; see p. 32 above). It is also significant that after February 1, 1937, the red caps (including plaintiffs) continued to receive their compensation in the same manner in which they had received it prior to the execution of the agreement of 1937, and in fact no changes whatever occurred in their relations with the defendant at that time.

The record contains numerous admissions by the plaintiffs' witnesses that the agreement of 1937 had no application to red caps. As set forth above, Wooten admitted that his organization did not represent red caps when the agreement of 1937 was made; that his organization had no interest in the red caps, had repeatedly refused to represent them for collective bargaining purposes, and did not in fact represent them for such purposes until almost two years after the agreement of 1937 became effective. On November 14, 1938, after Wooten had secured authority to represent the red caps, he asked in a letter to Wilkes (R. 51, 95; see above, p. 31) that Wilkes meet him " * * * and draw and sign a contract

covering them as you did not seem to be willing to agree that our present contract should cover them."

Further admissions with respect to the non-application to red caps of the agreement of 1937 are found in the testimony of the plaintiffs' witnesses in the depositions contained in the record. Plaintiffs' witness Wilkes, on direct examination by plaintiffs' counsel, said (R. 61):

"Q. Then the agreement of June 16, 1939, and the agreement of August 9, 1940, are the only two agreements your company has had with these men since the effective date of the Wage and Hour Law?

"A. That is correct. Both are in effect at the present time."

Plaintiffs' witness Wooten, upon being examined by plaintiffs' counsel (R. 83, 84), said:

"A. * * * At no time during the entire negotiation, starting at the conference of November 4, 1938, and up until the signing of the agreement of August 7, 1940, to be effective August 1, 1940, was there any agreement between Mr. Wilkes and myself as to the correct pay for the Red Caps from October 24, 1938, until August, 1940. * * *

After the Brotherhood of Railway Clerks secured authority to represent the red caps for the first time on November 3, 1938, Wooten entered into negotia-

tions with Wilkes, for the purpose of making an agreement to cover the working conditions and rates of pay of the red caps. These negotiations continued until June 16, 1939, almost eight months after the institution of the Accounting and Guarantee Plan. Wilkes refused to enter into any collective agreement with respect to rates of pay for the red caps, and insisted that the red caps should continue to receive their compensation under the Accounting and Guarantee Plan. However, an agreement covering the working conditions of the red caps was concluded on June 16, 1939.

In addition to all the factors set forth above, which indicate conclusively that the agreement of 1937 had no application to red caps, this first agreement covering red caps, effective June 16, 1939, itself lends support to the same conclusion. Many of the provisions of this agreement applying to red caps are almost identical with similar provisions in the agreement of 1937 (pp. 35-36, above). If the agreement of 1937 applied to red caps, there would have been no need to consume almost eight months in negotiations to arrive at an agreement which would cover them, and the provisions of which were almost identical with certain of those of the agreement of 1937. That this new agreement, concluded in 1939, was the first collectively bargained agreement covering red caps is further evidenced by the provisions of the agreement itself. Rule 1 of this agreement expressly negatives the claim that red caps were subject to the

prior Clerks' agreement of 1937. This rule states that:

"These rules shall govern the hours of service and working conditions of all Red Caps, Red Cap Captains, and all other employes handling hand baggage *not alreddy covered by agreement.*" (Above, p. 36) (Emphasis supplied)

Therefore, when the record in this case is analyzed, it is found that the claim of the plaintiffs, asserted here for the first time, that an agreement entered into in 1937 with the Brotherhood of Railway Clerks covered red caps, is completely unfounded. This conclusion is made inevitable by the terms of the agreement of 1937, which exclude persons such as red caps; by the circumstances surrounding the negotiation and execution of the agreement of 1937, which show that the Brotherhood had no interest in red caps and was not representing them; by the conduct of the Terminal Company and the plaintiffs subsequent to the agreement of 1937, which shows that the provisions of the agreement of 1937 were never applied to red caps and that no claim was ever made that the agreement should be so applied; by admissions of the plaintiffs' witnesses that the agreement of 1937 had no application to red caps; and finally by the terms of the agreement which was ultimately entered into between the Terminal Company and the Brotherhood, as the representative of the red caps, on June 16, 1939.

C. Even Assuming a Collectively Bargained Agreement Between the Plaintiffs and the Defendant to have been in Existence on October 24, 1938, the Notice of that Date, Instituting the Accounting and Guarantee Plan, Effected no Change which would Constitute a Violation of the Railway Labor Act.

The plaintiffs argue that the notice of October 24, 1938, which put the Accounting and Guarantee Plan into effect, violated Section 2, seventh, and Section 6 of the Railway Labor Act in that it was an attempt by the defendant to effect a unilateral change in an existing collectively bargained agreement covering the red caps. As the defendant has shown above, there was no such collective agreement in existence on October 24, 1938; but if, for the sake of argument, it is assumed, contrary to the facts, that the Clerks' agreement of 1937 did, by its terms and in accordance with the intention of the parties, cover red caps, nevertheless the notice of October 24, 1938, effected no change whatever in any of the provisions of that agreement. The two sections of the Railway Labor Act relied on by the plaintiffs apply only to changes in agreements and, therefore, have no application if there was in fact no change. There was in fact no change made, or attempted to be made, by the notice of October 24th, for two reasons: in the first place, because the notice related to a subject not covered by or included in the agreement of 1937 or any other collectively bargained agreement respecting red caps, and, in the second place, because the

notice did not effectuate or purport to effectuate any change whatever in the method by which the red caps had received their wages up to that time, but only provided for the payment to them of such additional sums as might be necessary to bring their wages in all instances up to the statutory wage prescribed by the Fair Labor Standards Act.

1: THE NOTICE OF OCTOBER 24, 1938, RELATED TO A SUBJECT NOT COVERED BY THE AGREEMENT OF 1937 OR BY ANY OTHER COLLECTIVELY BARGAINED AGREEMENT RESPECTING RED CAPS.

The notice of October 24, 1938, covered no subject and contained no provisions except with respect to the manner in which the red caps, including the plaintiffs, were to receive their compensation for the work they performed for the defendant.

The record shows that the agreement of 1937 (R. 156-189), negotiated as it was with respect to other classes of employees, not only contained no provision concerning rates of pay or method of payment for red caps, but contained no rates of pay for any class of employees, and was entirely barren of any provision setting forth what any employee should be paid or should receive as wages. In other words, even assuming that the agreement applied to red caps, there was nothing whatever in it that would be altered by a change in the red caps' wages or in the method of paying them. Consequently, no matter what provision the notice of October 24, 1938, might have

contained with respect to payment of wages to the red caps, that notice could not be held to have changed, or to have been an attempt to change, any provision in the agreement of 1937. This being so, the notice cannot be held to constitute a violation of those provisions of the Railway Labor Act which prohibit such changes without negotiation.

The record is full of statements showing that there never was any collectively bargained agreement of any kind between the defendant and the red caps, including plaintiffs, concerning wages or rates of pay during the whole of the period covered by this action. The plaintiffs' witness Wooten testified that the agreement of 1937 did not contain any provision with respect to wages. He said that provisions respecting wages of employees covered by that agreement were contained in two separate agreements, and he admitted that these separate agreements did not apply to red caps. In referring to the agreement of 1937, he said (R. 80):

"A. * * * That agreement does not carry any wage scale [scale] in it at all; that is a working agreement that you have just submitted; and between the date of that agreement and the date you have mentioned, July 1, 1940, there were two agreements between our organization and the Jacksonville Terminal Company pertaining to wages of employees covered by that agreement.

"Q. Are those agreements among the agreements which have been identified and introduced here?

"A. They are not.

"Q. Did those agreements relate to red caps?

"A. They did not.

"Q. In any way?

"A. They did not; but they did relate to the employees covered by that agreement at the time it was made."

Incidentally, this last statement of Wooten's is a further admission that the Clerks' agreement of 1937 did not cover red caps; for if it did not cover them at the time when it was made, it clearly could not have been extended to cover them save by subsequent agreement between the parties; and of course the defendant never made or assented to any such subsequent agreement.

It is clear from the record that there was never any collectively bargained agreement between the red caps and the defendant covering wages until August 7, 1940, which is over a month after the end of the period covered by this action. This is shown by Wooten's testimony (above, pp. 39-40; R. 4, 72-74). Therefore, even if it is assumed that the agreement of 1937 specifically covered red caps, there was no provision in this agreement which was changed, or attempted to be changed, or which could have been changed, by the notice of October 24, 1938.

2. THE NOTICE OF OCTOBER 24, 1938, DID NOT EFFECTUATE OR PURPORT TO EFFECTUATE ANY CHANGE IN THE MANNER IN WHICH THE RED CAPS HAD RECEIVED THEIR WAGES UP TO THAT TIME, BUT ONLY PROVIDED FOR THE PAYMENT TO THEM OF SUCH ADDITIONAL SUMS AS MIGHT BE NECESSARY TO BRING THEIR WAGES

IN ALL INSTANCES UP TO THE STATUTORY WAGE PRESCRIBED BY THE FAIR LABOR STANDARDS ACT.

Prior to the notice of October 24th the red caps received their compensation through being permitted by the defendant to keep the sums collected by them from the public for the service which they performed. As set forth above in detail (pp. 11-13), if the plaintiffs were in fact employees of the defendant prior to October 24, 1938, as they contend, and as the Interstate Commerce Commission found, then the services which they were performing for the public were being performed by the defendant, through the red caps as the defendant's employees. It follows that the sums which the Terminal Company permitted them to collect and keep constituted their remuneration or wages as such employees. The notice of October 24, 1938, made no change whatever in this situation. It merely notified the red caps that they would thereafter, in the future as in the past, be permitted to keep as their own the sums which they collected from the defendant's patrons. In the future, as in the past, these sums were to be their wages. However, the notice assured them, in addition, that in order to comply with the Fair Labor Standards Act the defendant would directly pay to them such further sums as should be needed to bring those wages in all instances up to the amount prescribed by Section 6 (a) of that Act. For this purpose it notified them that, in order that the defendant might obtain the information necessary to pay them these additional amounts if due, they would thenceforward be required to report to the defendant the

amount of money collected from its passengers, and that if said amount was less than the minimum prescribed by statute the Terminal Company would make up the difference. Under the terms of the notice, if the plaintiffs collected from passengers more than the statutory minimum, they were permitted to keep the entire amount, including the excess, as they had always done in the past.

In short, the method of wage payment announced by the notice of October 24, 1938, made no change in the method by which the red caps were being paid at the time when that notice was issued to them. All that it did was to inform them that thereafter in certain cases they would receive more, viz., whatever sums were needed to make up the full statutory minimum wage. Aside from this, they would continue to receive in the future exactly what they had always received in the past; viz., the amounts collected by them from the defendant's patrons. Certainly the only change which was thus effected was the change involved in promising to pay them the additional amounts needed to make up the guarantee. The tips, through which the balance of their wages was paid, were the same tips through which their wages had always been paid previously.

The plaintiffs themselves admit that there was no change in the method by which the red caps were paid after October 24, 1938, as compared with the method by which they had been paid their wages prior to that time. Thus at page 22 of the Petitioner's Brief appears the following statement:

"By continuing to allow the Red Caps to receive tips and gratuities from the passengers *as their compensation*, the Terminal Company ratified or confirmed the contractual relations regarding the right to and ownership of tips as being the property of the Red Caps, or in other words, *their wages for the work performed for the Company.*" (Emphasis supplied)

In the sentence just quoted the plaintiffs clearly admit that, prior to as well as after the notice of October 24, 1938, the tips became the property of the red caps only because the defendant gave its consent, and that the defendant did thus give its consent by permitting the tips, in becoming the property of the red caps, to be received by them as their "compensation" or "wages for the work performed for the Company." This was as true before the notice of October 24th as thereafter. The notice worked no change in the status of the red caps' compensation. It merely made that status clear and added the promise of the further and additional payments needed to make up the guarantee of the full minimum wage. The requirement of reporting the tips was simply to make it possible for the defendant to keep this additional promise.

There is, therefore, no ground whatever for contending that the notice attempted to effectuate a unilateral change in the method of paying the red caps their wages, even assuming that the existing method was embodied in a collective agreement, which of course it was not.

CONCLUSION.

If this case is viewed as a whole, in the light of all the considerations set forth above and the supporting facts and authorities, it becomes difficult to understand what wrong or injury the plaintiffs are complaining of herein. No money has been taken away from them; no change has been made or attempted to be made in any collective agreement respecting wages or rates of pay, or in any collective agreement of any sort; and indeed no change has been made in the plaintiffs' wages or rates of pay which results in their being in any worse position than before. The fact is that the Accounting and Guarantee Plan was instituted as part of an arrangement to enable each of the plaintiffs to receive as much or more money, and the plaintiffs as a group to receive more, than they would have without such an arrangement. In the words of Judge Waller in the District Court below (35 F. Supp. at p. 271): "*The red cap stood to win. He could not lose. The company stood only to lose. It could never win. The red cap could often receive for his services more than the minimum wage but never less.*" (R. 202). (Emphasis supplied).

Of course the plaintiffs' rights were in certain respects affected by the enactment of the Fair Labor Standards Act. That enactment, coupled with the finding of the Interstate Commerce Commission to the effect that they were employees of the defendant, entitled them to be thereafter paid by their employer not less than certain amounts. It did not, however,

require that those amounts should be paid in any particular manner or by any specific method. Nothing in the letter or purpose of the Act prohibited the defendant from paying the plaintiffs by continuing to provide them with the means of obtaining the necessary amounts of money from the defendant's patrons, and this is all that the Accounting and Guarantee Plan did. The defendant, as employer of the plaintiffs, was entitled, as a matter of common-law right and in the absence of a collective agreement to the contrary, to control the disposition of whatever sums the plaintiffs collected from defendant's patrons in the course of the employment, whether such sums are regarded as compensation for services or as tips or gratuities. The defendant therefore could lawfully have required the plaintiffs to pay over to it all sums so collected by them. But the defendant did not go so far as that. It merely notified the plaintiffs that the defendant would pay them not less than the full amount of money to which as employees they were entitled under the Fair Labor Standards Act, and that, in order to enable the defendant to do so, the plaintiffs should inform the defendant of the sums which they collected in the course of their duties in serving defendant's patrons, so that defendant would know what additional amounts, if any, it would have to pay them in order to make up the required total.

That was the sole significance of the notice of October 24, 1938. The notice did not constitute or purport to constitute a change in any agreement pro-

fected by statute, because (1) the only agreements protected by the statute in question (the Railway Labor Act) are those which are arrived at by collective bargaining, (2) no such collectively bargained agreement between the plaintiffs and the defendant was in existence on or prior to the date of the notice, and (3) in any event, even if there had been in existence at that time a collective agreement such as the plaintiffs claim, the notice neither effected nor purported to effect any change in any matter covered by the agreement. The only agreements between the plaintiffs and the defendant which were in fact in existence at the time of the notice were the understandings implicit in the conditions under which the plaintiffs worked individually from pay-day to pay-day. These understandings were subject to change by either party, upon proper notice thereof to the other party. If the notice of October 24, 1938, should be construed to effect any change in these understandings between the defendant and the plaintiffs individually; then such change was accepted by each plaintiff and became part of his understanding with the defendant when he continued to work and to accept the benefits conferred by the notice. In no other respect was any contract right of the plaintiffs, either individually or collectively, affected by the notice or by the Accounting and Guarantee Plan. Thus, by permitting the plaintiffs to retain as their own the sums which they collected from defendant's patrons in the course of their employment, and which

defendant could lawfully have compelled them to pay over to it, the defendant provided the plaintiffs with the means of obtaining from its patrons, in the form of sums which it could have claimed for itself, the money, or at least a portion of the money, to which they were entitled under the Fair Labor Standards Act; and, by paying directly to the plaintiffs the difference between the amounts thus collected and the statutory wage, the defendant insured to the plaintiffs payment of the full amount specified in the Act. This constituted a payment by the employer to the employee of the full statutory wage, just as much as if the defendant had paid the plaintiffs the whole amount directly in cash, or had paid them by transferring a claim against a bank for the full amount, in the form of a check. But even if this method of payment should not appear on its face to fall within the letter of the Fair Labor Standards Act, it certainly resulted in the payment to the plaintiffs by the act of the defendant, from sums which the defendant could have reclaimed, of the full amount of money which the Congress has specified as the amount necessary in its opinion to defray the cost of a minimum standard of decent living, and therefore it completely fulfilled the undisputed purpose of the Act and the manifest intent of the Congress in enacting it. Any other conclusion would amount to an interpretation of the Act in disregard of its purpose as well as of the proper sense of its language, and would, in the words of Judge Waller, "produce legislative or judicial brigandage," by sanctioning the employment of the Act

as an instrument to impose unwarranted burdens on the defendant and secure to the plaintiffs "the minimum wage, thrice multiplied," contrary to the policy of the Congress and to manifest principles of equity and justice.

Respectfully submitted,

JULIAN HARTRIDGE,

304 Bisbee Building,
Jacksonville, Florida.

JOHN DICKINSON,

1740 Broad St. Station Bldg.,
Philadelphia, Pa.

DECEMBER 8, 1941.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

WILLIAMS, Individually and as duly appointed and authorized agent and representative for HERBERT AIKEN, et al.,

Petitioners

VS.

JACKSONVILLE TERMINAL COMPANY,
a corporation,

Respondent

PETITION FOR RE-HEARING

FRANK F. LINGLE

525 Barnett National Bank Building
Jacksonville, Florida.

Solicitor for Petitioners.

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1941.

C. L. WILLIAMS, Individually and as duly appointed and authorized agent and representative for HERBERT AIKEN, et al.,

Petitioners

vs.

JACKSONVILLE TERMINAL COMPANY,

Respondent

PETITION FOR RE-HEARING

Comes now, C. L. Williams, individually and as duly appointed and authorized agent and representative for Herbert Aiken, et al., by his undersigned counsel, and prays the order of this Court granting a re-hearing in this cause unto your petitioner, upon the following grounds:

I

That the primary question involved, to-wit, "(a) Every employer **shall pay** to each of his employees who is engaged in commerce **wages** at the following rates" * * * *, is not answered by the decision of the Court that a tip received by the employee can be considered as a part payment of the wage so required, without the Court first finding that the Red Caps by an explicit understanding agreed to the change in the contractual relation.

II

That under the facts in this cause the Red Cap could not be considered a volunteer and keep his tips, because the Interstate Commerce Commission, approximately thirty days prior to the effective date of the Railway Labor Act, designated Red Caps as employees of the Terminal Company (page 8 of the Court's Opinion).

III

That the contention of the Terminal Company that the service of the notice to the Red Caps "that future earnings from tips must be accounted for and considered as wages" ipso facto, converted the ownership of the tips from the Red Caps to the Terminal Company, is refuted by the continued negotiations by the Terminal Company with the Red Caps' representatives for the judicial determination of the question, could tips be considered as payment of wages.

IV

That the law "that without an explicit understanding to the contrary", tips belong to recipient, is not met by the unilateral action of one party to the contract, that is, the Terminal Company, to attempt to change the status against the will and consent of the other party to the contract, that is, the Red Caps.

V

That the judgment of this Court will allow the Terminal Company to obtain an unjust and illegal enrichment by virtue of its deception practiced upon the public as to the true nature of the donation or tip given the Red Cap and its final resting place in the coffers of the Terminal Company, whereby by its own action it could have avoided the effect of an adverse decision to the Terminal Company, when it had the clear right to a judicial determination of its liability under the Fair Labor Standard Act as pointed out in the case of Janes, etc. VS Lake Wales Citrus Growers, et al., by the decision of the Circuit Court of Appeals, Fifth Circuit, reported in Volume 110, Federal Reporter, (2nd), page 653.

VI

That the failure of the Red Caps to quit the employment of the Terminal Company or to exercise their other privilege to strike and thereby endanger the transportation facilities of the Terminal Company and the public, should not be construed as an

acceptance of a contract attempted to be created by the Terminal Company, who never considered it binding, as evidenced by its continued negotiations with the representative of the Red Caps and its plea to the Red Caps for delay, in order that the question in dispute, i.e. could tips be considered as wages, could be judicially determined, which action definitely indicates the Terminal Company never believed they had a contract from the service of the notice.

VII

That the course of dealings of the Terminal Company in the negotiations extending from the effective date of the Act until the date of the institution of suit, clearly showed abandonment by the Terminal Company of the accounting and guarantee plan and it did not rely on the notice but on a judicial determination of the issue in dispute, that is, could tips be construed as wages.

VIII

That the Court in its decree finding that the Red Caps by their continued working after the posting of the notice, impliedly agreed to the changed working conditions, sets a standard by which to gauge the other facts in this cause, to-wit, the assertion by the Red Caps that the collective bargaining agreement of February 1937, was in effect as to them for that with the exception of the first letter to Wooten, dated immediately after the receipt of Wooten's letter of October 26, 1937, the

Terminal Company never again challenged the plaintiff's contention that the February agreement covered them or was this claim ever again asserted, in the face of the repeated claim and contention by Wooten that the Red Caps were covered by that agreement and that such collective bargaining agreement could not be changed or modified without thirty days notice required by the Railway Labor Act.

IX

That the Court in its opinion says that, the Red Caps by the continued working after the receipt of the notice, even though contending that the notice was not effectual as to them, ratified the implied contract of employment stated in the notice, but the Court overlooked the fact of the continued acceptance by the Terminal Company of Wooten's contention that the Red Caps were covered by the collective bargaining agreement of February, 1937, and that the Terminal Company continued its negotiations with Wooten concerning the February contract which could not be modified except as prescribed by the Railway Labor Act.

X

That if the Court applied the same rule of law in regard to continued dealings between the parties as a ratification of express or implied contracts of agreements, then the same rule applied to the course of dealings between the Terminal Company and the Red Caps, after receipt of the contention

of the Red Caps that the February, 1937, collective bargaining agreement covered the Red Caps, certainly ratified, both expressly or impliedly the Red Caps' contention of such coverage and assertion that this February, 1937, contract was the collective bargaining agreement and that the Terminal Company's continual treating with Wooten subsequent thereto was certainly a ratification of the Red Caps' contention.

XI.

That the Court overlooked the fact in the February agreement of 1937, wages for Red Caps were not mentioned, nor wages mentioned for any employees mentioned in that collective bargaining agreement.

XII

That the Court overlooked the fact that the February, 1937, agreement was the collective bargaining agreement as to the working hours, kinds of employment, class of employees and in construing the agreement as a collective bargaining agreement, then the mere fact that the Red Caps were not specifically mentioned therein and their wage definitely stated is not a sufficient reason to exclude them from the coverage of this collective bargaining agreement.

XIII

That the Court, in its opinion, says to interpret the statute "to pay wages" as limited to money passing from the Terminal Company to Red Caps, would

construe the Act on a narrow technicality, but the Court overlooked the fact that such construction in this case does by the same kind of narrow technicality condone the deception practiced by the Terminal Company upon the public who normally would think that the tip was given to the Red Cap and not to the Terminal Company, for the Red Cap's use and benefit and not the use and benefit of the Terminal Company.

XIV

That the Court on page 10 of its opinion, construed in note 15, the "a. About November 3 was when the official authorizations were turned over to me", to mean that Wooten never had any right to represent the Red Caps before that date, but the Court overlooked the answer of Wooten on his cross examination, pages 80 and 81 of the record, wherein he stated to the effect that the Red Caps had been negotiating with him approximately two years and his organization could not represent them until they were recognized as employees of the Terminal Company, and the Red Caps being designated by the Interstate Commerce Commission as employees of the Terminal Company thirty days before the effective date of the Act, Wooten's representation was effective from that date and not from date of official delivery of notices to him on November 3, which could have been executed days or weeks before. Such a construction is placing a narrow and restricted meaning upon the testimony solicited by counsel for the Terminal Company and upon which

testimony the Terminal Company introduced into the record the February, 1937, agreement, as the agreement in force at the time of the Act.

XV

That the Court failed to apply the fundamental law of contracts, i.e., that there must be a consideration, proper parties and a mutual agreement or understanding. In the dealings by both parties, i.e., the Terminal Company and Red Caps and there were proper parties, there were various considerations but there was never a mutual agreement or understanding between the Terminal Company and the Red Caps that the notice set forth the terms of the contract. The Red Caps refused to accept the terms and conditions imposed upon them by the notice. The Terminal Company never claimed that the notice was the contract and continued to negotiate with the Red Caps concerning the various matters and things mentioned in the notice until the institution of suit. It was not until after the institution of suit that such a construction placed upon the notice and the dealings and that construction by counsel for the Terminal Company only.

Respectfully submitted,

FRANK F. L'ENGLE

525 Barnett National Bank Building

Jacksonville, Florida

Solicitor for Petitioners

I, the undersigned counsel for C. L. WILLIAMS, Individually and as duly appointed and authorized agent and representative for HERBERT AIKEN, et al., Petitioners, do hereby certify that this motion for re-hearing is presented and filed in good faith and not for the purpose of delay.

FRANK F. L'ENGLE

Solicitor for Petitioners.

SUPREME COURT OF THE UNITED STATES.

No. 112.—OCTOBER TERM, 1941.

C. L. Williams, Individually, and as
Duly Appointed and Authorized
Agent and Representative of Her-
bert Aiken, et al., Petitioners,
vs.
Jacksonville Terminal Company.

On Writ of Certiorari to
the United States Cir-
cuit Court of Appeals
for the Fifth Circuit.

No. 1023.—OCTOBER TERM, 1940.

A. J. Pickett, General Chairman of
the Brotherhood of Railway and
Steamship Clerks, Freight Hand-
lers, Express and Station Employees,
etc, Petitioner,
vs.
The Union Terminal Company.

On Writ of Certiorari to
the United States Cir-
cuit Court of Appeals
for the Fifth Circuit.

[March 2, 1942.]

Mr. Justice REED delivered the opinion of the Court.

The question presented by both these cases is whether a rail-
road company operating a terminal subject to the Railway Labor
Act and the Fair Labor Standards Act of 1938 is required by
those statutes, in the absence of a negotiated agreement respect-
ing wages, to pay "red caps" a fixed minimum hourly wage irre-
spective of the tips from passengers received by the red caps,
or whether an accounting and guarantee plan which leaves all tips
with the red caps and assures them that each will receive at least
the minimum wage is valid.

The Fair Labor Standards Act is not intended to do away with
tipping. Nor does it appear that Congress intended by the general
minimum wage to give the tipping employments a earnings-prefer-
ence over the non-service vocations. The petitioners do not dispute
the railroad's contention that, during the entire period, each red
cap received as earnings—cash pay plus tips—a sum equal to the
required minimum wage. Nor is there denial of increased pay to

the red caps on account of the minimum wage guarantee of the challenged plan as compared with the former tipping system. The guarantee also betters the mischief of irregular income from tips and increases wage security. The desirability of considering tips in setting a minimum wage, that is, whether tips from the viewpoint of social welfare should be counted as part of that legal wage, is not for judicial decision.¹ We deal here only with the petitioners' assertion that the wages Act requires railroads to pay the red caps the minimum wage without regard to their earnings from tips.

The cases have a common background. Prior to October 24, 1938, the effective date of the Fair Labor Standards Act, the red caps at the terminals in question performed their familiar tasks without reward other than the tips of the passengers, and although subject to considerable supervision by the terminals² were not officially considered employees. On September 29, 1938, the Interstate Commerce Commission, acting under § 1 of the Railway Labor Act, 45 U. S. C. § 151, ruled that red caps in cities of over 100,000 population were employees within that Act. 229 I. C. C. 410.

Subsequent to that ruling the parallel series of events culminating in the two controversies now before us, while differing in details, followed the same general pattern. In No. 112 nothing further occurred until the Fair Labor Standards Act became effective. At that time the Jacksonville Terminal, in supposed compliance with the Act, began paying its red caps in cash the amount by which the statutory minimum wage exceeded each red cap's receipts in tips. This system in some form was used at the terminal until July 1, 1940.

In the belief that the Act required payment of the minimum wage without deduction of tips, the red caps, by their representative, Williams, brought an action against the terminal in United States District Court for the recovery of unpaid minimum wages between October 24, 1938, and July 1, 1940, and an equal additional amount as liquidated damages. Jurisdiction of the action was conferred by

¹ See Anderson, Tips and Legal Minimum Wages, XXXI American Labor Legislation Review 11; Gilson, Tips and Social Insurance, *id.* 67; Needleman Tipping as a Factor in Wages, Monthly Labor Review, December 1937, p. 1302.

² For example, the terminals forbade the collection of charges for red cap services, issued instructions for the meeting of sick or disabled passengers, provided equipment for that purpose, and required that red caps be uniformed and suitably dispersed about the terminal at such hours and in such places as their services would be needed.

§ 24(8) of the Judicial Code, 28 U. S. C. § 41(8), and by § 16(b) of the F. L. S. A., 29 U. S. C. § 216(b).³ The terminal answered and moved for summary judgment. Upon consideration of the exhibits, depositions, and stipulated facts the trial judge granted the motion, and the circuit court of appeals affirmed. 118 F. 2d 324. Because of the importance of the question whether the tips could be treated as payment of the statutory wage, the petition of the red caps' representative for certiorari was granted. — U. S. —

Section 6 of the Act requires every employer to pay each employee engaged in interstate commerce wages at the prescribed rates per hour.⁴ Violation of that requirement renders the employer liable for the unpaid wages and for liquidated damages recoverable in an action by the employees' designated agent or representative.⁵ Since the terminal admitted by stipulation that Williams was the red caps' authorized representative ad litem, that the red caps were its employees, and that they were engaged in interstate commerce,

“(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.” June 25, 1938, c. 676, § 16(b), 52 Stat. 1069.

“(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

“(1) during the first year from the effective date of this section, not less than 25 cents an hour.

“(2) during the next six years from such date, not less than 30 cents an hour.

“(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.” June 25, 1938, c. 676, § 6, 52 Stat. 1062, 29 U. S. C. § 206.

“As used in this Act (b) ‘Commerce’ means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

“(c) ‘Employee’ includes any individual employed by an employer.

“(d) ‘Wage’ paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging; or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.” June 25, 1938, c. 676, § 3, 52 Stat. 1060, 29 U. S. C. § 203.

³ See note 3, *supra*.

the sole issue was whether the payment required by § 6 of the Act had been made.

The evidence, taken most favorably to the red caps, discloses the following. About October 24, 1938, the effective date of the Act, the terminal issued a written notice to each red cap:

"Jacksonville, Florida,
Oct. 24th, 1938.

"To Red Cap
"Jacksonville Terminal Company:

"In view of the requirements of the Fair Labor Standards Act, effective October 24, 1938, and in consideration of your hereafter engaging in the handling of hand baggage and traveling effects of passengers or otherwise assisting them at or about stations or destinations, it will be necessary that you report daily to the undersigned the amounts received by you as tips or remuneration for such services.

"The carrier hereby guarantees to each person continuing such service after October 24, 1938 compensation which, together with and including the sums of money received as above provided, which will not be less than the minimum wage provided by law.

"You are privileged to retain subject to their being credited on such guarantee all such tips or remuneration received by you except such portion thereof as may be required of you by the undersigned for taxes of any character imposed upon you by law and collectible by the undersigned.

"All the matters above referred to are subject to the right of the carrier to determine from time to time the number and identity of persons to be permitted to engage in said work and the hours to be devoted thereto, to establish rules and regulations relating to the manner, method and place of rendition of such service, and the accounting required.

"JACKSONVILLE TERMINAL COMPANY.

"By J. L. WILKES,

"President-General Manager."

On November 3rd L. L. Wooten, the General Chairman of the Brotherhood of Railway and Steamship Clerks, received the red caps' designation of the Brotherhood as their bargaining representative. November 4th he saw a copy of the terminal's notice. In the meantime he had written Wilkes on October 25th that in view of the L. C. C. decision he considered the red caps covered by the collective labor agreement of February 1, 1937, between the Brotherhood and the terminal, and within the union's jurisdiction. After the designation the Brotherhood continually pro-

testing the invalidity of the existing accounting and guarantee system,⁶ attempted negotiations with the Terminal for a red cap contract. Eventually, June 16, 1939, a contract limited to hours of service and working conditions was signed. Meanwhile the red caps continued their accustomed activities, made the reports, kept the tips, and accepted the sums proffered them by the terminal. At first no receipts for wage payments were required at Jacksonville; later receipts were introduced expressly reserving the red caps' right to sue for additional amounts under the Act.⁷ On July 1, 1940, the terminal inaugurated a new system of charging passengers ten cents per parcel for red cap service, and paying the red caps an hourly wage. An agreement with the Brotherhood reducing this arrangement to writing and ending the controversial accounting and guarantee system was signed August 9th.

No. 1023 is a similar proceeding brought against the Union Terminal Company by Pickett, the agent of forty-five red caps working in the Dallas terminal. At the trial the evidence, consisting of an agreed statement of facts, some exhibits, and some uncontradicted testimony, indicated, and the trial judge found, that the red caps were employees of the terminal and were engaged in interstate commerce. He further found that prior to the Fair Labor Standards Act the red caps were paid by the tips of the public, that no other contract was made on or since October 22, 1938, and that the question of tips as wages was still an open one. On the ground that tips of the public were not wages paid by the employer, he gave judgment in favor of the red caps. The circuit court of appeals reversed, 118 F. 2d 328, and certiorari was denied, 313 U. S. 591. Because of the importance of the issues presented, on petition for rehearing certiorari was granted. — U. S. —

Since the basic elements of Pickett's case are no longer in dispute, the crucial issue again is whether the minimum wages were paid. It was shown that after the L. C. C. ruling that red caps were employees, the red caps notified the Dallas terminal on

⁶ The system was so described because the red caps made a daily accounting of the number of hours worked, and the amount of tips collected, and because the terminal guaranteed the overall receipt of the minimum wage by paying the red caps semi-monthly any shortage between the total tips and the minimum.

⁷ The receipt stated:

"It is my understanding that by signing this receipt I do not forfeit or release my right to sue for such additional amount as may be due under Section 16(b) of the Act."

October 11, 1938, that the Board of Adjustment of the Brotherhood of Railway and Steamship Clerks was their authorized representative under the Railway Labor Act, and Pickett, as General Chairman of the Board, asked for a conference in order to negotiate an agreement. On October 22d, the terminal delivered to each red cap a letter, signed by Buckner, the terminal's vice-president and general manager, in the same terms as the notice used at the Jacksonville terminal.

Two days later on October 24th, the effective date of the wage law, Pickett, on behalf of the red caps and at their request, protested this proposal in a letter to Buckner,⁸ concluding:

"This letter is formal notice to the carrier, made for and on behalf of each employee concerned as a protest against the method proposed by the carrier to meet its obligation under the said law, and since it appears that the carrier has acted in the premise without authority of law or upon order of the Administrator, we are accordingly filing this notice of protest, for the reasons set forth herein."

No action was ever taken to recall or revoke the letter of pro-

⁸ The entire letter is as follows:

"I have a copy of a circular issued by your Company dated at Dallas, Texas, on October 22, 1938, and which was handed to each employee to whom it was addressed: i. e., red caps, the general tenor of which is to require the individual employee to report to the carrier the amount that he receives in tips from the public and which information the carrier intends to employ in compiling its records to indicate that it has complied with Section 6 of the Fair Labor Standards Act:

"In other words, the carrier contemplates crediting tips and other moneys paid to its employees by persons other than itself to relieve itself of the obligations imposed by the following quoted section of the law:

"Fair Labor Standards Act:

"Section 6-(a). Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates:-

"(1) during the first year from the effective date of this section, not less than 25 cents an hour."

"The above section of the law which is quoted in part for the purpose of this notice, clearly sets forth that every employer who engages in commerce shall pay to each his employees during the first year after the effective date of the law 25 cents per hour."

"An examination of the law in its entirety does not authorize the carrier to depend upon others to discharge its obligation with respect to the law, in payment of wages imposed thereby.

"This letter is formal notice to the carrier, made for and on behalf of each employee concerned as a protest against the method proposed by the carrier to meet its obligation under the said law, and since it appears that the carrier has acted in the premise without authority of law or upon order of the Administrator, we are accordingly filing this notice of protest, for the reasons set forth herein."

test and the individual red caps never told the company that they accepted the terms of its letter of October 24th.

On December 26th, 1938, Pickett submitted to Buckner a proposed general agreement covering the hours of service and working conditions of the red caps, but not their wages. After protracted consideration of the matter by both the terminal and the union, Buckner wrote Pickett on December 6, 1939, as follows:

"As I told you and as you know, this case as to whether or not the railroads will be allowed credit for tips received up to \$2.40 per day, is in the Court and as soon as same is decided, we will be glad to negotiate an agreement with the Clerks Union, of which you are the General Chairman for this Company."

On January 1, 1940, although the wage dispute was not yet settled, a working agreement of the limited type Pickett had proposed was signed. On March 6, 1940, the accounting and guarantee system was abandoned by the terminal, presumably for the ten cent per parcel charge, and the following day this action was commenced. Throughout the entire preceding period the red caps had performed their usual duties, had filed slips showing the hours worked and, except for a brief period, the tips received, had kept the tips, and had accepted the money paid by the terminal pursuant to its guarantee. Never, however, was the demand for additional pay abandoned, and no red caps were discharged for refusing to expressly consent to the terminal's action.

Effect of Terminals' Notice. The terminal companies instituted the accounting and guarantee system by the written notice, quoted above, to each red cap as the Act became effective. It is accepted here by all parties that, both prior and subsequent to the notice, the red caps were employees of the railroads,⁹ engaged in a service "so closely related to physical transportation" in interstate commerce as to come under section 6(1) of the Interstate Commerce Act. *Stopher v. Cincinnati Union Terminal*, 246 I. C. C. 41, 45. As such employees, before the notice they were permitted by agreement to come upon the terminal property, render supervised service to the companies' customers and receive pay for performing this portion of the terminals' transportation business by retaining all tips received. This employment of the

⁹ In the Matter of Regulations Concerning Class of Employees and Subordinate Officials to be Included within Term "Employee" Under the Railway Labor Act, Ex parte No. 72 (Sub. No. 1), 229 I. C. C. 410; cf. *Cole v. R. R.*, 211 N. C. 551, 191 S. E. 353; *Booker v. Penna. Railroad Co.*, 82 Pa. Super. 588.

red caps was at will and subject to the employers' conclusions as to the desirability of continuing their employment. In businesses where tipping is customary, the tips, in the absence of an explicit contrary understanding, belong to the recipient. *Polites v. Barlin*, 149 Ky. 376, 149 S. W. 828; *Zappas v. Roumeliote*, 156 Iowa 709, 137 N. W. 935; *Manubens v. Leon*, [1919] 1 K. B. 208. Where, however, an arrangement is made by which the employee agrees to turn over the tips to the employer, in the absence of statutory interference, no reason is perceived for its invalidity.¹⁰ The employer furnishes the facilities, supervises the work and may take the compensation paid by travelers for the service, whether paid as a fixed charge or as a tip. A tip to a red cap is compensation for service. It is customarily given and always expected when such service is rendered.

With the effective date of the Act the employers became bound to pay a minimum wage to their employees, the red caps. Accordingly the latter were notified that future earnings from tips must be accounted for and considered as wages. Although continuously protesting the authority of the railroads to take over the tips, the red caps remained at work subject to the requirement. Such protests were unavailing against the employers. Although the new plan was not satisfactory to the red caps, the notice transferred to the railroads' credit so much of the tips as it affected. By continuing to work, a new contract was created. This result follows because the employer, after notice, may keep all earnings arising from the business. *Labatt, Master & Servant*, (2d ed.) Vol. 5, § 2037; *Restatement, Agency*, § 388. If the red cap did not accept the terms offered he would be a volunteer and not an employee. As a volunteer he could probably keep his tips, but would not be entitled to a contractual wage. *Restatement, Contracts*, § 55. No such gift of services to the terminals is here claimed.

Railway Labor Act. Petitioners assert that whatever may be the authority to issue orders for the accounting and guarantee plan these railroads could not validly exercise the power because of the *Railway Labor Act*. 48 Stat. 1185. The applicable provisions are quoted in the note below.¹¹

¹⁰ On the general question of the validity of a contract to turn over tips, see the following cases: *Harrison v. Kansas City Terminal Ry. Co.*, 36 F. Supp. 434, 438; *Gloyd v. Hotel La Salle Co.*, 221 Ill. App. 104; *In re Farb*, 178 Cal. 592, 174 P. 320; *Setree v. Falkner*, 3 C. C. H. Labor Law Service (3d ed.) ¶ 60,779, 2 P. H. Labor Service ¶ 22,547 (Ohio App.).

¹¹ 48 Stat. 1187-88, Sec. 2. "First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make

The object of the Act is to avoid interruption to commerce through the promotion of free association among employees for the purpose of settling disputes between them and the carriers.

Sec. 2. To assure continued operations, changes by the carriers in agreements reached through collective bargaining, pending negotiations, are prohibited. Independent individual contracts are not affected by the Act. It is to be noted that section 2, First to Sixth, inclusive, relied upon by petitioners is largely concerned with the organization of employees, freedom from carrier interference in such organization, the choice of representatives for collective bargaining and the manner of entering into and carrying on such negotiations. Section 2, Seventh, note 11, *supra*, forbids changes of pay or working conditions of employees "as a class as embodied in agreements" except as provided in section 6, note 11 *supra*. The crucial section 6 is phrased so as to leave no doubt that only agreements, reached after collective bargaining were covered. Section 2, Seventh, first appeared in the 1934 amendments to the Railway Labor Act and section 6 was likewise then amended by adding "in agreements" to that section's former requirement of notice of "an intended change affecting rates of pay, rules or working conditions." Compare Sec. 6, 44 Stat. 582, with Sec. 6, 48 Stat. 1197. These

and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

"Seventh. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act." 45 U. S. C. § 152.

Id., 1197. "Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act; by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board." 45 U. S. C. § 156.

additions point squarely to limiting the bargaining provisions of the Railway Labor Act to collective action.¹²

In No. 112, the Jacksonville case, petitioners find such an agreement in the contract of February 1, 1937, the "Revised Agreement Between the Jacksonville Terminal Company and Employees Herein Named Represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees." The scope of that agreement is limited to the hours of service and working conditions of certain groups of employees in none of which do red caps appear.¹³ Wages are not covered. When the contract was negotiated, the red caps were not thought of as employees engaged in transportation service.¹⁴ Evidently the red caps only authorized the contracting Brotherhood to represent them after the notice.¹⁵ Neither party to the agreement took any steps in regard to the red caps under the 1937 agreement until after the disputed plan was instituted. Thereafter, when the Brotherhood first claimed that the red caps were covered by the 1937 Clerks' contract, the suggestion was promptly repudiated in writing by the terminal company. Finally, after the authorization, the Brotherhood did immediately begin negotiations for the red caps and ultimately secured a collective contract, June 16, 1939, which covered hours of service and working conditions and which embodied much that was in the Clerks' contract. Sub-

¹² Cf. *Virginian Ry. v. Federation*, 390 U. S. 515, 548-549; *Labor Board v. Jones & Laughlin*, 301 U. S. 1, 44-45.

¹³ The closest are groups (2) and (3) described as follows:

"Group (2) Other office and station employees—such as office boys, messengers, chore boys, train announcers, gatemen, baggage and parcel room employees, train and engine crew callers, telephone switchboard operators, elevator operators, office, station and warehouse watchmen and janitors."

"Group (3) Laborers employed in and around stations, storehouse, and warehouses."

¹⁴ Ex parte No. 72 (Sub. No. 1), *supra*, n. 9; *Stopher v. Cincinnati Union Terminal Co.*, 246 I. C. C. 41.

¹⁵ The General Chairman of the Brotherhood testified:

"Q. Does that organization have the authority, or were they appointed by the red caps, or the plaintiffs in this case, the red caps employed by the Jacksonville Terminal Company, to negotiate contracts and wage agreements for them with the Jacksonville Terminal Company?"

"A. It was."

"Q. At or about what time?"

"A. About November 3rd, was when the official authorizations were turned over to me."

"Q. What year?"

"A. 1938."

sequently a wage agreement of August 9, 1940, became a part of this earlier working agreement. While no finding as to its coverage appears in the record, we are clear from the 1937 contract, its practical application by the parties and the new arrangements ultimately concluded that the red caps were not within its terms.

A different approach to this particular problem is made by petitioner in No. 1023, the *Union Terminal* case. The Dallas red caps do not rest their argument upon any collective agreement. Their contention is that since the Brotherhood of Clerks, their then accredited representative for the purposes of the Railway Labor Act, had asked the terminal on October 11, 1938, for a conference to negotiate an agreement for working conditions and other related subjects, the subsequent act of the terminal in establishing the accounting and guarantee plan violated the Railway Labor Act and was therefore ineffective to change the existing arrangement by which the red caps retained the tips as their own. This, it is urged, would result in a recovery of the minimum wage without credit to the carrier for the tips. Petitioner relies upon the first six paragraphs of section 2 of the Railway Labor Act, 48 Stat. 1187, and particularly section 2. First, note 11 *supra*, placing the duty on the carrier to "make . . . agreements . . . in order to avoid any interruption . . . to the operation of any carrier."

The Brotherhood and the terminal did negotiate and finally concluded, effective January 1, 1940, their first collective working agreement covering the red caps. Because the carrier was, by the act, placed under the duty to exert every effort to make collective agreements, it does not follow that pending those negotiations, where no collective bargaining agreements are or have been in effect, the carrier cannot exercise its authority to arrange its business relations with its employees in the manner shown in this record. As we have stated in discussing the *Jacksonville* case, the Railway Labor Act dealt with collective bargaining agreements only and not with the employment of individuals. This conclusion is pertinent in considering the effect of the Dallas request for collective bargaining.

The institution of negotiations for collective bargaining does not change the authority of the carrier. The prohibitions of section 6 against change of wages or conditions pending bargaining and those of section 2, Seventh, are aimed at preventing changes in conditions previously fixed by collective bargaining agree-

ments. Arrangements made after collective bargaining obviously are entitled to a higher degree of permanency and continuity than those made by the carrier for its own convenience and purpose.

Minimum Wages. We stated in the discussion of the notice given by the terminals to their employees that its effect was to transfer the tips covered by the notice to the credit of the terminals. But this terminal credit in the hands of the red caps, assert petitioners in both cases, cannot be utilized as cash paid to the employee by the employer.¹⁶ It is urged that the terminals have worked out a scheme to largely relieve themselves of wage payments to red caps and to let travelers pay "amounts which the law requires should be paid by the employer itself" and that the accounting difficulties make the plan not only undesirable but contrary to the policy of the statute as likely to foster false reports of tips by red caps in order to reach the minimum and save the terminals from any guarantee payments.

Section 6 prescribed that "Every employer shall pay to each of his employees . . . wages at the following rates."

Wages are defined only by the direction to include in that word the "reasonable cost . . . to the employer of furnishing such employee with board, lodging, or other facilities."

What the word "wages" connotes in addition to the items specified, we must deduce from other provisions of the act in the light of its legislative purpose. Obviously "pay-wages" ordinarily means for the employer to hand over money or orders convertible into money at face. The absence of the word "tip" from the statutory extension of the ordinary meaning of wages makes it quite clear that not every gratuity given a worker by his employer's customer is a part of his wages. If Congress had had it in mind to include in wages all tips, the words were readily available for expressing the thought. Such a conclusion, however, does not foreclose a de-

¹⁶ In No. 112, petitioners say: "We are dealing here only with Fair Labor Standards Act and not any other Act, statute or ruling of any commission." It is the mandatory requirement of the act "that the employer shall pay." The act contains no word, or words, or phrases suggesting any guarantee of payment."

In No. 1023, petitioners say: "We, of course, do not want to be understood as contending that 25 cents received in tips will not purchase as much as 25 cents received in wages, but we do say that Congress had the right to say what means should be employed to carry out the purposes of the act, and that Congress has said, and for very good reasons, that the purposes of the act can best be accomplished by a direct wage payment from the employer to the employee."

position that in certain specific situations the so-called tips may be in reality the employee's compensation for his services and therefore wages.

The diverse interests of employers and employees have variously influenced legislators to include, exclude, or ignore tips in the specification of wage items in enactments where the wage base was important. For example, the Longshoremen's and Harbor Workers' Compensation Act,¹⁷ which also applies to employment in the District of Columbia,¹⁸ specifically includes tips for computation of compensation. Workmen's compensation acts are usually construed as including tips in wages or remuneration, with a tendency to make the inclusion of tips as wages turn upon the contemplation of the parties, express or implied, in wage contracts.¹⁹ State minimum wage acts are generally silent as to tips.²⁰ Under the N. R. A. the inclusion of tips in wages on a plan similar to the

¹⁷ March 4, 1927, c. 503, § 2(13), 44 Stat. 1425; 33 U. S. C. § 902(13).

¹⁸ Act of May 17, 1928, c. 612, 45 Stat. 600.

¹⁹ Compare *Hartford Co. v. Industrial Acc. Com.*, 41 Cal. App. 543, 183 P. 234; *Gladys Gross' Case*, 132 M. 59, 166 A. 55; *Powers' Case*, 275 Mass. 515, 176 N. E. 621; *Sloat v. Rochester Taxicab Co.*, 177 App. Div. 1, 163 N. Y. S. 904, aff'd mem. 221 N. Y. 391, 116 N. E. 1076; *Bryant v. Pullman Co.*, 188 App. Div. 311, 177 N. Y. S. 488, aff'd mem. 228 N. Y. 579, 127 N. E. 909; *Kadison v. Gottlieb*, 226 App. Div. 700, 233 N. Y. S. 485; *Lloyds Casualty Co. v. Meredith*, 63 S. W. 2d 1051 (Tex. Civ. App.); *Federal Underwriters Exchange v. Husted*, 94 S. W. 2d 540 (Tex. Civ. App.); *Penn. v. Spiers & Pond, Ltd.*, [1908] 1 K. B. 766 (C. A.); *Great Western Railway v. Helps*, [1918] A. C. 141 (H. L.) with *Bagendorf v. Swift & Co., Inc.*, 193 App. Div. 404, 183 N. Y. S. 917; *Anderson v. Horling*, 826, 211 N. Y. S. 487. But cf. *Industrial Com. v. Lindway*, 94 Colo. 531, 31 P. 2d 495; *Makis v. Top Hat Restaurant, Inc.*, 16 N. J. Misc. 26, 195 A. 857; *Coates v. Warren Hotel*, 18 N. J. Misc. 363, 13 A. 2d 787, where gratuities were excluded by statute. Unemployment compensation is apparently following the same trend. Compare *Matter of Feinberg*, 258 App. Div. 834, 15 N. Y. S. 2d 76 with *Alex. Hamilton Hotel Corp. v. Board of Review*, 127 N. J. L. 184, 21 A. 2d 739. See *Wage and Hour Manual* (1941 ed.) 191.

²⁰ See 2 A. C. C. H. Labor Law Serv. (3d ed.), 2 P. H. Labor Serv., *passim*. Probably this is due to the fact that in most states the statute does not fix the minimum, but merely authorizes some board or official to do so by orders "by occupation." Such orders as relate to trades in which tipping is common seem to take tips into consideration in setting the minimum wage for that trade, and quite naturally, therefore, are apt expressly to forbid crediting of tips against the minimum.

E.g., New York State Dept. of Labor, Minimum Wage Standards, Directory Order No. 5, Restaurant Industry, effective June 3, 1940, provides: "SERVICE EMPLOYEES Basic Rate. The basic minimum wage for service employees in New York City shall be at the rate of 20 cents per hour. NON-SERVICE EMPLOYEES Basic Rate. The basic minimum wage for non-service employees in New York City shall be at the rate of 29 cents per hour from June 3, 1940 through March 2, 1941 and 30 cents thereafter. GRATUITIES. In no event shall gratuities from patrons or others be counted as part of the minimum wage. SERVICE EMPLOYEE. 'Service employee' means any employee

accounting and guarantee plan, here involved, was proposed.²¹ In the approved codes tips were not expressly credited toward wages, but the relatively lower minimums for those customarily receiving tips may indicate that tips were given weight although not expressly mentioned.²² The federal social security laws define wages for old age benefits²³ and social security taxes²⁴ as "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash." The regulations of the Social Security Board state, "The following are excluded from the computation of 'wages': . . . Tips or gratuities paid directly to an employee by a customer of an employer, and not in any way accounted for by the employee to the employer."²⁵ The Railroad Retirement Act, § 1(h),²⁶ and the Railroad Unemployment Insurance Act, § 1(i)²⁷ exclude tips from "compensation" within the meaning of their provisions. The Railroad Retirement Board has determined that all earnings of the red caps, accounted for to the carriers under the plan here in question, are "money remuneration" and therefore "compensation" under the acts and not forbidden "tips".²⁸ We can therefore examine the Fair Labor Standards Act with the safe assumption that the word "wages" has no fixed meaning either including or excluding gratuities.

whose duties relate solely to the serving of food to patrons seated at tables and to the performance of duties incidental thereto, and who customarily receive gratuities from such patrons." See also, New York State Dept. of Labor, Minimum Wage Standards, Directory Order No. 6, Hotel Industry, effective Nov. 25, 1940; New Hampshire Bureau of Labor, Minimum Wage Division, Mandatory Order No. 3, Restaurant Occupation, effective Nov. 1, 1938; District of Columbia Minimum Wage Board, Order No. 4, Public Housekeeping Occupation, effective May 8, 1938, and reprinted in the Annual Report of the Board for 1939, pp. 27-28.

²¹ Proposed Code of Fair Competition for the Hotel Industry, submitted Sept. 6, 1933, by the American Hotel Association, Art. III(C)(c); Proposed Code of Fair Competition for the Barber Shop Trade, as revised for public hearing on Jan. 8, 1934, submitted by the Barbers' Industrial Recovery Association, Art. IV(1); Restaurant Industry Code of Fair Competition, submitted Sept. 12, 1933, by the National Restaurant Association, Art. IV, § 6.

²² See Needleman, Tipping as a Factor in Wages, *supra*, note 1, at 1319.

²³ Aug. 10, 1939, c. 606, § 209(a), 50 Stat. 1373; 42 U. S. C. § 409(a).

²⁴ I. R. C. §§ 1426(a), 1607(b); 53 Stat. 1383, 1392; 26 U. S. C. §§ 1426(a), 1607(b).

²⁵ Reg. 2, Art. 14, Social Security Board, 2 F. R. 1280; 20 C. F. R. § 402.14. See also S. S. T. 301, 1938-1 Cum. Bull. 455.

²⁶ Act of June 24, 1937, c. 382, § 1(h), 50 Stat. 309; 45 U. S. C. § 228a(h).

²⁷ Act of June 25, 1938, c. 680, § 1(i), 52 Stat. 1095; 45 U. S. C. § 351(i).

²⁸ Opinion No. 1941, R. R. 35, U. I. 11, approved by the Board on September 18, 1941, B. O. 41-397, 3 Railroad Retirement Law Bulletin —.

To interpret "pay-wages" as limited to money passing from the terminal to the red cap would let construction of an important statute turn on a narrow technicality. It, of course, can make no practical difference whether the red caps first turn in their tips and then receive their minimum wage or are charged with the tips received up to the minimum wage per hour.²⁹

Congress approached the problem of improving labor conditions by the establishment of a minimum wage in certain industries. It required that workers in these industries receive a compensation at least as great as that fixed by the Act. Except for that requirement the employer was left free, in so far as the Act was concerned, to work out the compensation problem in his own way. Other courts are in accord with our view. *Harrison v. Kansas City Terminal Ry. Co.*, 36 F. Supp. 434; *Harrison v. Terminal R. R. Ass'n of St. Louis*, 4 C. C. H. Labor Cases ¶ 60,346; *Ryan v. Denver Union Terminal Co.*, id., ¶ 60,618.

The other arguments of petitioner have been considered but we find only two that require mention.

First. It is said that if the carriers take credit for the tips as compensation for red cap service, it would be in effect a charge by the terminals for a transportation service, and therefore, since the terminals have filed no covering tariff, a violation of § 6(7) of the Interstate Commerce Act, 34 Stat. 587, 49 U. S. C. § 6(7).³⁰ Furthermore, petitioners assert section 2 of the same act, prohibiting special rates, is violated because by the carrier's regulations

²⁹ The former plan is substantially the tag system put into effect by agreement of the red caps and the carrier at Jacksonville following the termination of the accounting and guarantee system. The important provisions are:

"1. Red Caps will be paid the hourly wage established by the Hours and the Wage Law, or orders of the Administrator, at the minimum set in such orders or law.

"2. Daily records of each Red Cap's hours, tags sold, and money re-remitted, will be kept by the Company; at the end of each 15 day period or pay roll period, all money received from sale of checks, etc., by Red Caps will be totaled, wages paid to Red Caps, deducted after one (1) cent per parcel or tag has been set aside for Company expenses, the remaining nine (9) cents used to pay wages of Red Caps, and Captains, other than the ten (10) cents per hour for Captains covered in Item 2.

"If the sum total of nine (9) cents per parcel handled and or tags sold is greater than the wages paid to Red Caps for that period, the remaining funds will be divided among all Red Caps on the basis of hours worked during the pay roll period, so that all Red Caps will share alike for each hours service, from this fund. If the nine (9) cents per parcel handled is not sufficient to pay wages outlined in item (1) of this agreement, the Terminal Co. agrees to pay the wages as outlined in item 1."

³⁰ Cf. *Stopher v. Cincinnati Union Terminal*, 246 I. C. C. 41.

the indigent receive the red cap service without charge. Neither contention, if true, would avail petitioners. Sections 8, 9 and 10 of the Interstate Commerce Act provide for damages to persons injured by unlawful acts and punishment of the carrier or its agents. There is nothing in the sections to indicate that petitioners would have a right of action.³¹

Second. It is urged in the *Dallas* case that the terminal from March 1, 1939, to October 15, 1939, voluntarily abandoned the accounting and guarantee system in favor of the old system of non-accountability for tips. We find nothing in the modified accounting practice during that period to support such a conclusion. Rather the terminal seems only to have simplified its bookkeeping and partially relieved the red caps of clerical duties. Prior to March 1, 1939, and after October 15th, the red caps had to make a daily report of both hours worked and tips received, regardless of amount, on a printed time slip furnished by the terminal for the purpose. Between March 1st and October 15th, the time slips furnished by the company contained no provision for reporting tips, but only for reporting hours.³² But the red caps were instructed that should any of them during any work period receive in tips less than 25 cents per hour, the statutory minimum hourly wage, he should report it to the terminal and the terminal would pay the difference between the tips received and the minimum wage. Thus the only effect of the change was to eliminate the superfluous reporting of tips equalling or exceeding the minimum wage—a step toward more efficient administration, not elimination, of the accounting and guarantee system.

Affirmed.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.

³¹ *Brownlee v. Southern Ry. Co.*, 192 U. S. 119, 121. The Commission stated: "It is well settled that a carrier is entitled to compensation for any transportation service rendered, and that where a service has been rendered for which no tariff authority exists and the beneficiary of such service has paid the sum claimed by the carrier, we are empowered to order the payment of reparation only in the event the sum paid by the shipper amounted to an unjust or unreasonable exaction for the service received." See also *Twin Coach Corp. v. Erie R. Co.*, 203 U. S. 393, 395; *Cities Service Oil Co. v. Erie R. Co.*, 237 U. S. 387, 389.

³² Mr. Flanagan:

"We next offer in evidence PLAINTIFF'S EXHIBIT 'C', which is also a time slip but a little different from the one just read, and it reads:

"The Union Terminal Company. Date Hours on duty from M. to M., showing four of those lines."

"And then says: 'Total hours worked' and then a blank line to be signed by the Red Cap and right under it the words 'Red Cap.'"

"I call attention to the fact that on this slip there is no provision for reporting the tips."

Mr. Justice BLACK, dissenting, with whom Mr. Justice DOUGLAS and Mr. Justice MURPHY concur.

I think the judgments should be reversed. It appears to me that the question in these cases is: Upon whom does the statute impose the duty of paying a minimum wage, the employer or someone else? There is no ambiguity in the congressional mandate that "Every employer shall pay, to each of his employees . . . wages not less than 30 cents an hour." I am unable to agree that tips given to red caps by travellers are "wages" paid to the red caps by the railroad.

The employers here could have openly charged a fee for the services performed by red caps. It appears that they have now adopted such a system. It is said that there is no practical difference between a system under which the railroads openly impose a charge on the public and one under which the red caps accept from travellers so-called tips, treated by the railroad as a part of the red caps' wages. Generally, the traveller who pays a railroad charge knows he is paying it to the railroad. One who gives a red cap a tip does not necessarily know that he is thereby helping the railroad to discharge its statutory duty of paying a minimum wage to its employees. The tip-paying public is entitled to know whom it tips, the red cap or the railroad. A plan like that before us, which covertly diverts tips from employees for whom the giver intended them to employers for whom the giver did not intend them and to whom any kind of tip doubtless would not have been voluntarily given, seems to me to contain an element of deception. And I think that an interpretation of the F. L. S. A. which permits employers to benefit from such a plan does not accord with the meaning of the language used by Congress.